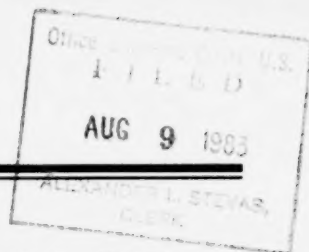


No. 83-____



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WYNN OIL COMPANY,

Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,
Respondent.

Petition For Writ Of Certiorari To The
Court Of Appeals Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the New Mexico courts deprive Petitioner of its property without due process of law by imposing liability on Petitioner for the breach of a contract, to which Petitioner was not a party, where no viable theory existed upon which Petitioner's liability could have been predicated?

2. Did the New Mexico courts deprive Petitioner of its Fourteenth Amendment guarantees of notice and opportunity to be heard by imposing liability against Petitioner based on an arbitrary and capricious misinterpretation of the New Mexico Court of Appeals' own prior opinion in the same case?

NAMES OF ALL PARTIES, AND OF AFFILIATE OF PETITIONER

The names of the parties to the proceeding in the Court of Appeals of the State of New Mexico are as follows: Wynn Oil Company, and Southern Union Exploration Company of Texas (formerly known as Southern Union Exploration Company, which was formerly known as Southern Union Supply Company). Wynn Exploration Co., Inc. may be considered an affiliate of Wynn Oil Company, and was a party at the trial court level, but was not a party to the proceeding in the New Mexico Court of Appeals, and is not a party here.

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REPORTS OF OPINION BELOW

The first opinion in this case is reported as *Southern Union Exploration Co. v. Wynn Exploration Co., Inc.*, 95 N.M. 594, 624 P.2d 536 (Ct. App.), *cert. denied*, 95 N.M. 593, 624 P.2d 535 (1981), *cert. denied*, 455 U.S. 920, 102 S. Ct. 1276 (1982). The second opinion of the New Mexico Court of Appeals is unreported, although the denial of a petition for writ of certiorari is reported at ____ N.M. ____, 662 P.2d 645 (1983).

JURISDICTION

The New Mexico Court of Appeals entered its second judgment in this case on March 10, 1983. (App. 1a).¹ On

¹ References to the Appendix to this Petition are cited as "App. ____." References to Plaintiff's trial exhibits not included in the

April 22, 1983, the New Mexico Supreme Court denied a timely petition for writ of certiorari (App. 6a). On May 12, 1983, the New Mexico Supreme Court denied a timely motion for rehearing of its order denying the petition for writ of certiorari (App. 5a). Petitioner believes that 28 U.S.C. § 1257 confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 provides, in pertinent part, as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background

This case involves the imposition of liability on one corporation, Petitioner Wynn Oil Company ("Wynn Oil"), for the contractual obligations of a separate corporation, Wynn Exploration Company ("Wynn Exploration"). The case arose as a dispute between joint venturers in an oil and gas exploration and development project in Lea County, New Mexico.

The joint venture had its genesis in discussions between a representative of Southern Union Supply Company (now known as Southern Union Exploration Com-

Appendix are cited as "P. Ex. ____." References to portions of the Record not included in the Appendix are cited by volume and page as "____ R. ____." References to the trial transcript are cited by volume and page as "____ Tr. ____."

pany of Texas, the Respondent in this case, and referred to hereinafter as "Southern Union"), and R. C. Wynn, president of two Texas corporations, Petitioner Wynn Oil, and Wynn Exploration. After discussions concerning the proposed venture, the Southern Union representative and R. C. Wynn signed a letter agreement dated September 8, 1975 (the "First Document"), and an Operating Agreement dated September 15, 1975 (the "Second Document," App. 63a), which bore the names of Southern Union as "Operator," and Wynn Oil as "Non-Operator." These two documents called for a 75% interest in the project for Wynn Oil and a 25% interest for Southern Union.

The First and Second Documents identified the initial well to be drilled, and contemplated that Southern Union, as Operator, might choose to drill additional wells on specified lands. Paragraph 12 of the Operating Agreement (Second Document) provided, however, that Southern Union would give the Non-Operator thirty days written notice of its intention to drill, rework, deepen, or plug back any additional wells (App. 63a). Failure of a party receiving such a notice to affirmatively reply, in writing (App. 65a), that it elected to participate in the proposed operation would "constitute an election by that party not to participate in the proposed operation" (App. 63a), in which event Southern Union would bear the "entire cost and risk of conducting such operations" (App. 64a).

Subsequently, an additional letter agreement, dated November 18, 1975 (the "Third Document") was signed on behalf of Southern Union and on behalf of Wynn Exploration (App. 67a). This Third Document provided that the First and Second Documents were amended to the extent that the name of the party contracting with Southern Union was Wynn Exploration, not Wynn Oil, and that

Wynn Exploration and Southern Union would share costs and obligations of the project on a 50-50, rather than a 75-25, basis. In a subsequent letter to a third party, Southern Union and Wynn Exploration jointly stated that a purpose of the Third Document was "to reflect the correct reference to Wynn Exploration Company" (P. Ex. 35).

Southern Union worked five wells in addition to the initial well. Wynn Oil did not elect to participate in any of these five wells. Wynn Exploration, on the other hand, did elect to participate in most of the five subsequent wells drilled, reworked, deepened, or plugged back by Southern Union (P. Exs. 30, 40, 47, 52, 53, 99, 100, 105, 106, 115, 116, 117, 120, 121). Southern Union sent invoices for 50% of its expenses on these subsequent wells to Wynn Exploration, not to Wynn Oil.

During the spring of 1976, relations between Southern Union and Wynn Exploration deteriorated. Wynn Exploration became convinced that Southern Union, through utilization of controversial and unproven stimulation techniques, had negligently destroyed the recoverability of billions of cubic feet of natural gas reserves. Because the monetary value of the lost recoverable reserves far outweighed Wynn Exploration's 50% share of the drilling and operating expenses, and because of discrepancies in the Southern Union invoices submitted to Wynn Exploration, it withheld payment.

B. The First Trial

In June of 1976, Southern Union sued Wynn Exploration and Wynn Oil to recover one-half of its costs of drilling and operating the six wells on the project in the Santa Fe, New Mexico, district court. Almost simultaneously, Wynn Exploration sued Southern Union

in the Dallas County, Texas district court for breaches of the contract of the parties. The New Mexico trial court denied Wynn Oil's *forum non conveniens* motion to dismiss, even though Southern Union, Wynn Oil, and Wynn Exploration were all headquartered in Dallas County, Texas. Ultimately, Southern Union added R. C. Wynn, individually, as a defendant, Wynn Exploration counter claimed against Southern Union, Wynn Exploration filed an independent suit in New Mexico against Southern Union for, *inter alia*, negligent operation of the wells and attendant loss of recoverable reserves, and the actions were consolidated for trial in Santa Fe County, New Mexico.

In its Third Amended (trial) Complaint, Southern Union alleged that the effect of the Third Document (November 18, 1975 letter agreement, App. 67a) was to "substitute . . . Wynn Exploration in place of . . . Wynn Oil in the written Operating Agreement" (5 R. 1812). Wynn Oil and Wynn Exploration both admitted this averment (5 R. 1886). Southern Union asserted that Wynn Oil should be liable along with Wynn Exploration, however, because both corporations were allegedly the alter egos of R. C. Wynn.

Most of the trial of the case, which lasted several weeks, was devoted to trying Wynn Exploration's claim against Southern Union. Southern Union tried its case against Wynn Oil on the theory that there was only one contract, composed of the First, Second, and Third Documents. Southern Union conceded that Wynn Oil was not a party to this contract; in its post-trial brief it reiterated that the Third Document was executed to comply with the request that "Wynn Exploration Company, Inc. ('Wynn Exploration') be substituted for Wynn Oil as the contracting party on the Wynn side" (10 R. 3466), and also

reiterated that its theory of recovery as against Wynn Oil was alter ego (10 R. 3484).

Approximately three months after the conclusion of the trial, the judge sent a letter opinion to counsel (App. 39a). Concerning Wynn Exploration's claim against Southern Union for negligent operation of the wells, he stated that he would rule against Wynn Exploration, even though its evidence on this issue "was impressive," and the explorations "might otherwise be done today" (App. 43a).² Concerning Southern Union's claims, the trial judge rejected the alter ego theory but, inexplicably, stated that he

² At the trial, expert witnesses for both sides estimated that the Morrow formation underlying the property contained between 14.5 and 17.7 billion cubic feet of recoverable gas (VIII Tr. 136-37; IX Tr. 1408-09; X Tr. 1723; XIV Tr. 2617-19). An expert witness for Wynn Exploration testified that Southern Union's negligence had virtually destroyed the recoverability of the estimated reserves (VI Tr. 1052-53). This was vehemently denied by Southern Union's experts, who testified that Southern Union had not been negligent and that the reserves were still recoverable (XIV Tr. 2636-37). At a supersedeas bond hearing, both Wynn Oil and Wynn Exploration argued that a supersedeas bond should not be required since, according to Southern Union's expert witnesses at the trial, the value of Wynn Exploration's interest in the recoverable reserves vastly exceeded the judgment against them. Southern Union, however, then produced a new expert witness who admitted that Southern Union's conduct had greatly reduced the volume of recoverable reserves, and further testified that the value of Wynn Exploration's interest in the property was only \$219,000 (15 June 1979 Hearing Tr. 30). In view of the extraordinary inconsistency between Southern Union's trial testimony and its supersedeas hearing testimony on the same matter, Wynn Oil and Wynn Exploration moved in the Court of Appeals for remand to the trial court, so that a motion for new trial could be filed, but the Court of Appeals denied the motion.

would enter judgment against Wynn Oil in addition to Wynn Exploration.³

Faced with the task of proposing findings of fact that would support a judgment against Wynn Oil, after the alter ego theory—the only theory pled or tried—had been rejected, Southern Union suggested that the First, Second, and Third Documents constituted the entire contract, that Wynn Oil was a party to all three documents, and that the Third Document effectuated an assignment by Wynn Oil of its rights to Wynn Exploration, but without an attendant release by Southern Union of Wynn Oil's obligations. The trial court adopted Southern Union's proposed assignment-without-release finding verbatim in its Findings of Fact (App. 32a-33a), and entered its Judgment against Wynn Oil and Wynn Exploration in the amount of \$1,879,791.22 (App. 51a).⁴

³ The trial judge at the close of his letter, which, to say the least, was less than a model of clear expression, invited requests for clarification from counsel. By letter dated April 5, 1979 (10 R. 3595-96), counsel for Wynn Oil Company requested of the trial court clarification of its basis for holding Wynn Oil liable, as no theory had been pled or tried, other than the rejected alter ego theory, upon which to hold Wynn Oil liable. This request for clarification went unanswered by the court.

⁴ The trial court initially entered findings, and companion conclusions of law and judgment, without having responded to the request for clarification made by Wynn Oil's counsel, and without having given Wynn Oil "a reasonable opportunity to submit requested findings of fact and conclusions of law," as required by the New Mexico Rules of Civil Procedure. The trial court granted Wynn Oil's motion to vacate its original judgment, findings, and conclusions, and on May 10, 1979, Wynn Oil filed its requested findings of fact and conclusions of law. The next day, the trial court entered its May 11, 1979 Decision of the Court (App. 31a) and Judgment (App. 51a), with virtually no changes from the originals.

C. The First Appeal

On appeal, the New Mexico Court of Appeals sustained Wynn Oil's attack on the assignment-without-release finding. It held that Wynn Oil was not a party to the Third Document, and that the Third Document was not an assignment of rights from Wynn Oil to Wynn Exploration (App. 20a, 21a). The Court of Appeals also rejected Southern Union's alter ego theory brought forward by it on its cross appeal. It did not expressly disturb the trial court's finding that all three documents together constituted the contract. Even though Wynn Oil had prevailed on both points briefed, the Court of Appeals held that Wynn Oil was "liable on the basis of the documents it executed," *i.e.*, liable "for its obligations under the first two documents" of the three-document contract (App. 21a). The Court of Appeals remanded the case for further proceedings "in connection with the amount of the judgment" (App. 30a).⁵

D. Remand

On remand, Wynn Oil attempted to focus the trial court's attention "on the liability of Wynn Oil for its

⁵ Baffled by the new theory of liability confected by the Court of Appeals, Wynn Oil sought redress in the New Mexico Supreme Court by way of a petition for writ of certiorari. The New Mexico Supreme Court initially denied the petition, subsequently granted Wynn Oil's motion for rehearing, later vacated its order granting the rehearing, and finally denied Wynn Oil's second motion for rehearing.

Wynn Oil then filed a timely Petition for Writ of Certiorari in this Court, No. 81-971, in which it contended that the New Mexico courts had violated its due process and equal protection rights by holding that it could be liable at all under the circumstances of the case. This Court denied the petition without opinion. *Wynn Oil Co. v. Southern Union Exploration Co.*, 455 U.S. 920, 102 S. Ct. 1276 (1982).

obligations under the first two documents" (App. 21a). The evidence undisputedly showed that Wynn Oil had executed only the First and Second Documents, which authorized only the drilling, completion, and operation of the first of the six wells drilled by Southern Union. It undisputedly showed that Wynn Oil had *not* executed any document by which it elected to participate in any of the five subsequent wells drilled by Southern Union. The evidence did show that Wynn Exploration had consented to participate in the drilling of four of the five subsequent wells (P. Exs. 39, 40, 47, 52, 53, 99, 100, 105, 115, 116, 117, 120, 121).

Thus, Wynn Oil contended on remand that it was liable for, at most, 75% of the net expenses of the drilling and completion of the first well, pursuant to the First and Second Documents, in the amount of \$346,345.41, plus interest. Wynn Exploration conceded that, pursuant to the Third Document and the consents to participation it executed, it was liable for 50% of the net expenses of the drilling and completion of the second, third, fifth and sixth wells, or \$1,466,045.30, plus interest.

The trial court stated, however, that it read the original Court of Appeals opinion to require Wynn Oil to be jointly and severally liable with Wynn Exploration for 50% of the entire net amount spent for the drilling, completion, and operation of the first, and four of the five subsequent, wells (App. 11a). The trial court found, at Southern Union's request, that Wynn Exploration and Wynn Oil "were consenting parties" to these five wells, despite the total lack of evidence that in any way tended to show that Wynn Oil had consented to participate in the drilling, completion, or operation of any well other than the first well. The trial court entered its Judgment against Wynn Oil and Wynn Exploration, jointly and

severally, in the amount of \$1,683,102.55, plus interest (App. 47a, 50a), or an amount in excess of \$1 million more than Wynn Oil's share of the expenses for the one well in which it had agreed to participate.⁶

On appeal, Wynn Oil argued to the New Mexico Court of Appeals that under its first opinion, Wynn Oil was to be held liable only on the documents that it actually executed, and that it had executed no documents which could possibly lay a predicate for liability for any of the wells drilled or completed by Southern Union other than the first well. The Court of Appeals disposed of the appeal rather summarily by recognizing that Wynn Oil executed only the first two documents, but stating that "it does not follow from a reading of the (first) opinion as a whole in the context of the issues raised, that Wynn Oil was not liable, on all three (documents) jointly with Wynn (Exploration)" (App. 3a). The Court of Appeals made no effort to harmonize its position with its prior holdings in its first opinion in the case. Nor did it make mention of the undisputed fact that Wynn Oil, by not affirmatively notifying Southern Union that it elected to participate in the subsequent wells, had thereby elected under Paragraph 12 of the Second Document (Operating Agreement) "not to participate in the cost of the proposed operation" (App. 63a).

D. Federal Questions

Wynn Oil filed its Petition for Writ of Certiorari in the New Mexico Supreme Court, in which it contended that the Court of Appeals opinion and imposition of liability was so irrational, and so departed from the remand stand-

⁶ Within a few days of the entry of the Judgment on the Mandate, Southern Union collected on a \$1,500,000.00 letter of credit that Petitioner had posted as a supersedeas bond.

ard set in its first opinion, as to deprive Wynn Oil of its property without due process of law (App. 55a-59a). After the denial (App. 6a) of the petition, Wynn Oil repeated its due process challenges in its Motion for Rehearing (App. 60a-62a), which the New Mexico Supreme Court also denied (App. 5a).

REASONS FOR GRANTING THE WRIT

A. The New Mexico Courts Have Arbitrarily And Capriciously Entered A Very Substantial Judgment Against Petitioner, And Have Thereby Deprived Petitioner Of Its Property Without Due Process Of Law, In Violation Of The Decisions Of This Court

The Fourteenth Amendment forbids a state court judgment if it "amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' " *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927). If a case "between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment." *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940).

Southern Union admitted below that Wynn Exploration had been "substituted for Wynn Oil as the contracting party" (10 R. 3466; *see also* 5 R. 1812, 1886), and originally sought judgment against Wynn Oil solely on an alter ego theory. The New Mexico Court of Appeals on the first appeal rejected this theory, but held that Wynn Oil was "liable on the basis of the documents it executed," *i.e.*, liable "for its obligations under the first two docu-

ments" (App. 21a). The pertinent documents are summarized as follows:

<u>DOCUMENT</u>	<u>PARTIES</u>	<u>REMARKS</u>
First Document (Sept. 8, 1975 Letter Agreement)	Wynn Oil (Petitioner) and Southern Union	Authorized first well only
Second Document (Sept. 15, 1975 Operating Agreement, App. 63a-66a)	Wynn Oil (Petitioner) and Southern Union	Authorized first well; required written election to participate as condition for being charged with costs of subsequent wells
Third Document (November 18, 1975 Letter Agreement, App. 67a-68a)	Wynn Exploration and Southern Union	In Southern Union's words, "substituted" Wynn Exploration "for Wynn Oil as the contracting party"

<u>DOCUMENT</u>	<u>PARTIES</u>	<u>REMARKS</u>
Written Elections to Participate in Subsequent Wells (P. Exs. 39, 40, 47, 52, 53, 99, 100, 105, 106, 115-17, 120, 121)	Executed by Wynn Exploration, not by Petitioner	Petitioner's failure to consent constituted "an election by that party not to participate in the cost of the proposed operation," and placed the "entire cost and risk of conducting such operations" on the "Consenting Parties," <i>i.e.</i> , Southern Union and Wynn Exploration
Invoices for costs of subsequent wells	Sent to Wynn Exploration, not to Petitioner	

As has been demonstrated, the two documents executed by Wynn Oil could give rise to liability *only* for a portion of the net expenses of drilling and completing the first of the six wells drilled by Southern Union. Yet the New Mexico courts on remand held Wynn Oil liable for one-half of the net expenses of not one, but five, of the wells, in violation of the prior holding in the case, and without factual or legal support.

Probably nothing is more fundamental and well-settled that, absent special circumstances such as alter ego, a person cannot be held liable for the breach of a contract to which he is not a party. *Barnes v. Sadler Associates, Inc.*, 95 N.M. 334, 622 P.2d 239 (1981); *Gallup Electric Co. v. Pacific Improvement Co.*, 16 N.M. 86, 113 P. 848 (1911). Wynn Oil was a party to no contract by which it could be liable for any portion of the expenses of the five subsequent wells drilled by Southern Union. The theories advanced for Wynn Oil's liability for the subsequent wells are summarized as follows:

<u>THEORY</u>	<u>ORIGIN</u>	<u>REMARKS</u>
1. Alter ego	Only theory pled or tried by Southern Union	Rejection by trial court and Court of Appeals in its first opinion
2. Assignment without release	Trial Court	Rejected by Court of Appeals in its first opinion
3. Consent	Trial Court	Undisputedly refuted by the evidence; not even mentioned by Court of Appeals
4. The first "opinion as a whole in the context of the issues raised"	Court of Appeals	A facially unreasonable misinterpreta- tion of the first opinion

Wynn Exploration did elect to participate in four of the five subsequent wells, and thereby became contractually obligated to pay 50% of the expenses of working those wells, but the only two theories ever even suggested that could possibly explain Petitioner's derivative liability for Wynn Exploration's contractual obligations for the subsequent wells—alter ego and assignment—were totally rejected by the courts below. The “consent” and first “opinion as a whole” theories are mere ipse dixit fiat, at war with the evidence and the holdings of the first opinion.

What remains is a judgment of liability for nearly two million dollars, bereft of underlying factual or legal support. It is a judgment that “is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.” It is a judgment “in violation of settled principles of law and contrary to undisputed facts.” It “amounts to mere arbitrary or capricious exercise of power.” This Court should grant its Writ of Certiorari and reverse this irrational judgment in order to vindicate Petitioner's constitutional right to adjudication that is neither arbitrary nor capricious.

B. The New Mexico Courts Have Deprived Petitioner Of Its Property Without Notice Or Opportunity To Be Heard, In Violation Of The Decisions Of This Court.

A state court civil defendant is entitled to notice of the claims against it, and an opportunity to be heard in its own defense. A state court, appellate or trial, violates due process where it affirms or enters a judgment on a theory that has not been pled or tried, because the civil defendant is thereby denied notice and opportunity to be heard. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (reversal of state court judgment

where violation of due process because state appellate court affirmed judgment on a theory not previously pled or tried; defendant not afforded "an opportunity to be heard and defend its substantive right"); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917) (reversal of state court judgment where violation of due process because state appellate court decided the case against defendant on a new theory against which defendant did not have "the proper opportunity to present his evidence"); see *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415 (5th Cir. 1981) (reversal of judgment based on a theory neither pled nor tried because "notice demands of procedural due process" not met).

On remand in this case, the one theory of liability of which Wynn Oil had notice was that it was supposedly "liable on the basis of the documents it executed," i.e., "for its obligations under the first two documents" (App. 21a). At the second trial, it showed the trial court the extent of its obligation under these two documents—75% of the net expenses of the first well. The New Mexico courts, however, disregarded the law of the case, and the evidence, and held Petitioner liable on *five* wells, to its damage in an amount in excess of one million dollars.

Neither the trial nor appellate court, nor yet Southern Union, even attempted to provide a rational explanation of how Petitioner could have this greater liability. They never explained how Wynn Oil could be liable for drilling expenses on wells in which it undisputedly never consented to participate, or how it could be liable for drilling expenses for wells that were drilled pursuant to documents that it never executed.⁷ The only "explanation"

⁷ The trial court found, at Southern Union's request, that "Wynn Exploration Company, Inc. and Wynn Oil Company were consenting parties" (App. 8a). As discussed hereinabove, the Second Document

ever offered was a facially unreasonable *misinterpretation* of the first opinion in the case.

Thus, judgment has been imposed on Wynn Oil by the New Mexico courts, and has been substantially collected by Southern Union, in an amount many hundreds of thousands of dollars over the maximum amount for which it could be liable on the theory that was supposed to control the case on remand. If any rational theory does support the judgment, it remains unarticulated to this day, and Petitioner has never had notice of, or an opportunity to rebut, any such phantom theory. This Court should grant the Petition and reverse the Judgment below in order to vindicate Petitioner's Fourteenth Amendment right to notice of the claims against it and an opportunity to be heard in its own defense.

C. This Court Should Remind The State Courts That The Fourteenth Amendment Requires Notice, Opportunity To Be Heard, And Rational Adjudication Of Civil Controversies

Whether it be due to the lack of experience, ability, or judicial temperament, or whether it be due to other reasons, the New Mexico courts in this case produced an unconstitutionally irrational result, and can be expected to produce similarly irrational results in similar cases. In fact, Petitioner in its previous Petition for Writ of Certiorari filed in this Court, No. 81-971, made the same statement: New Mexico courts could be expected to pro-

(Operating Agreement, App. 63a-65a) required that a non-operator consent in writing to participate in a well before it would be responsible for any of its cost. Undisputedly, however, Petitioner never executed any consent documents for any well but the first; Wynn Exploration, on the other hand, did execute such participation consents for subsequent wells (P. Exs. 39, 40, 47, 52, 53, 99, 105, 106, 115, 116, 117, 120, 121).

duce similarly irrational results in other cases, unless this Court reminded the state courts that they must treat litigants before them in an even-handed fashion and decide cases on some rational basis (Pet. in No. 81-971 at 15). Perhaps emboldened by this Court's denial of Wynn Oil's first petition, the New Mexico courts acted as feared. They need a reminder from this Court, more than ever before, that the Fourteenth Amendment provides certain minimal safeguards of notice, opportunity to be heard, and rationality for civil litigants in state courts.

CONCLUSION

The New Mexico Courts have violated Wynn Oil's rights to notice of the claims against it, and an opportunity to present its evidence and defenses; have arbitrarily and discriminatorily violated their own rules of appellate review; and have entered, and countenanced the substantial collection of, a ruinous judgment against Wynn Oil on a substantively irrational basis. This Court, as the ultimate guardian of our Constitution, should not permit such flagrant violations of the due process guarantees. Relaxation of constitutional oversight can and will allow unconstitutionally irrational decision making in the state courts.

Petitioner's last hope of vindication lies in this Court. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940). Petitioner submits that the issues and constitutional violations are so clearly drawn that this case is well-suited to a summary disposition on the merits pursuant to S. Ct. R. 23.1.

This Court should grant the Petition not only to do justice between these parties, but to make clear to the

state courts that the Constitution does not tolerate arbitrary, capricious and irrational adjudication.

Premises considered, Petitioner Wynn Oil Company respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari, and that it issue a writ of certiorari to review the judgment of the New Mexico Court of Appeals and the orders of the New Mexico Supreme Court.

Respectfully submitted,

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May 6, 1983 Motion for Rehearing filed in the New Mexico Supreme Court (pages 1, 2, and part of 3)	60a
September 15, 1975 Operating Agreement (cover page, part of Paragraph 12, Paragraphs 22 and 30, and part of Paragraph 31)	63a
November 18, 1975 Letter Agreement	67a

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NO. 5795

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

FILED

'83 MAR 10

Plaintiff-Appellee

v.

WYNN OIL COMPANY,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE
COUNTY**

KAUFMAN, Judge

STRASBURGER & PRICE

MONTGOMERY & ANDREWS

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WALTER J. MELENDRES

Santa Fe, New Mexico

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WILLIAM P. TEMPLEMAN

LINDSAY A. LOVEJOY, JR.

Santa Fe, New Mexico

Attorneys for Appellant

MEMORANDUM OPINION

BIVINS, Judge

This case has been before this Court before. Southern Union, Etc. v. Wynn Exploration, 95 N.M. 594, 624 P.2d 536 (Ct. App. 1981); *cert. denied*, 95 N.M. 593, 624 P.2d 535; *cert. denied*, 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 461 (1982). Upon remand, the trial court entered judgment against Wynn Oil (Wynn Oil Company) and Wynn X (Wynn Exploration Co., Inc.), jointly and severally, and awarded damages for 50% of

the costs incurred by SX (Southern Union Exploration Company) on all five wells. Wynn Oil appeals again.

Wynn Oil does not challenge the calculations or the figures utilized by the trial court as required in our first opinion. The defendant's sole contention is that under the prior decision of this Court, Wynn Oil can be held liable only on the first two agreements (the letter agreement dated September 8, 1975 and the operating agreement dated September 15, 1975) for 75% of the net costs of the first well ("Gallagher State 8-2 well"). Wynn Oil claims that our prior decision mandates this result. We disagree.

In defining the doctrine of law of the case, the Supreme Court in *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (1978) said, "This doctrine means that the law applied on the first appeal of a case is binding on the second appeal. This rule applies not only to questions specifically decided, but also to those necessarily involved, and those questions which could have been so raised." 92 N.M. at 758 (citation omitted). Wynn Oil has no quarrel with this principle and, in fact, advances it in support of its position.

Wynn Oil cites us to parts of our opinion claimed to be favorable to its position, while disregarding other parts. For example, Wynn Oil relies heavily on the language contained in "(e) Miscellaneous" where we rejected the trial court's finding that by the third (change of name) document, Wynn Oil assigned its rights to Wynn X. We went on to say, "This has no effect on the liability of Wynn Oil for its obligations under the first two documents," and in the following paragraph:

The trial court's findings referred to Wynn Oil and Wynn X "jointly as Wynn." This joint reference provides no basis for a reversal inasmuch as Wynn X is not contesting its liability and inasmuch as Wynn Oil is liable on the basis of the documents it executed.

95 N.M. at 599.

Our opinion recognized the existence of a basis for Wynn Oil's liability on all documents. While it is correct that Wynn Oil

executed only the first two agreements, it does not follow from a reading of the opinion as a whole in the context of the issues raised, that Wynn Oil was not liable on all three agreements jointly with Wynn X. Under the discussion entitled "(b) Party to Contract," we noted the trial court's finding that three documents constituted "the contract." We then reviewed Wynn Oil's claim that R. C. Wynn never intended to make Wynn Oil a party to the agreement. In rejecting Wynn Oil's request that this Court find facts in its favor, we said:

The two documents signed by Wynn Oil, and the testimony of the SX witness concerning the negotiations and preparation of these documents are substantial evidence supporting the finding that Wynn Oil was a party to *the contract*.

95 N.M. at 598. (emphasis added).

The discussion under paragraph "(e) Miscellaneous" cannot be isolated from the remainder of the opinion. We must look to the opinion as a whole to determine its effect. The decision did essentially two things: first, it affirmed the "judgment of liability against Wynn Oil and Wynn X, entered May 11, 1979 . . ." and, "remanded to the trial court to correct errors in the amount of the judgment. . . ." 95 N.M. at 602. The trial court correctly followed our opinion and the mandate, and we affirm its judgment.

SX asks that damages be awarded under § 39-3-27, N.M.S.A. 1978 on the grounds that Wynn Oil's appeal is frivolous, not in good faith and merely for the purposes of delay. We

find this request to be meritorious, and award SX damages of \$1,000.

Costs of this appeal shall be assessed against Wynn Oil.

IT IS ORDERED.

/s/ William W. Bivins
WILLIAM W. BIVINS, Judge

WE CONCUR:

/s/ Mary C. Walters
MARY C. WALTERS, Chief Judge

/s/ C. Fincher Neal
C. FINCHER NEAL, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, May 12, 1983

No. 14,862

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

Respondent.

Proceeding on Certiorari

This matter coming on for consideration by the Court upon Motion of Petitioner for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner for rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Friday, April 22, 1983

No. 14,862

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

Respondent.

Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised:

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 5795 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO COUNTY OF SANTA FE

Filed April 26 1982

No. 51726 Consolidated SF 77-1263

SOUTHERN UNION EXPLORATION COMPANY
OF TEXAS, a Delaware corporation,

Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et. al.,

Defendants.

WYNN EXPLORATION COMPANY, INC.,

Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN UNION
SUPPLY COMPANY and SUPRON ENERGY
CORPORATION, formerly Southern Union
Production Company,

Defendants.

DECISION OF THE COURT

The Court, having heard the evidence and the arguments of counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision.

FINDINGS OF FACT

1. The \$34,867.43 item for delay rental and operating costs mentioned in the Opinion of the Court of Appeals should be allowed. There is justly due and owing by the defendants Wynn Exploration Company, Inc., and Wynn Oil Company, through October 31, 1978, before calculation of interest on a monthly basis and deduction for revenues received on a month-

ly basis, the sum of \$1,600,083.44 for the drilling, completion and operation of the wells in issue in this cause to which Wynn Exploration Company Inc. and Wynn Oil Company were consenting parties.

2. After calculation of interest on a monthly basis and credit for revenues received on a monthly basis in accordance with the Opinion of the Court of Appeals of the State of New Mexico, the amount of the judgment of this Court entered in this cause on May 11, 1979 should be \$1,714,571.41.

3. The proper application of the proceeds of the special master's sale of the interest of Wynn Exploration Company, Inc. in the property in issue is as follows:

Total Amount Paid by Plaintiff at Sale	\$50,000.00
Costs and Expenses of Sale	\$ 485.25
Special Master's Fee	\$ <u>2,000.00</u>
Balance Applied to Judgment and Debt ...	<u>\$47,514.75</u>

4. The interest accrued on the judgment from May 12, 1979 until the special master's sale on July 5, 1979, revenue credits accrued from May 12, 1979 until the special master's sale on July 5, 1979 and the application of the amounts bid by the plaintiff at the special master's sale are:

Interest on Judgment Amount of \$1,714,571.41 for Period 5/12/79 to 7/5/79	\$ 25,836.01
Less Revenue Received 5/12/79 to 7/5/79	\$ <u>9,790.42</u>
Interest on Judgment Amount of \$1,714,571.41 Unpaid as of 7/5/79	\$ <u>16,045.59</u>
Proceeds of Sale Applied to Interest After Expenses of Sale	\$ 16,045.59

Proceeds of Sale Applied to Principal	
After Expenses of Sale	\$ <u>31,469.16</u>
Total	\$ <u>47,514.75</u>
Judgment	\$1,714,571.41
Less Proceeds of Sale Applied to Principal	\$ <u>31,469.16</u>
Deficiency as of 7/5/79	<u>\$1,683,102.55</u>

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as a matter of law as follows:

1. The Court has jurisdiction of the parties and over the subject matter of this action.

2. The plaintiff, Southern Union Supply Company, later known as Southern Union Exploration Company and now known as Southern Union Exploration Company of Texas, should be granted Judgment on the Mandate against the defendants Wynn Exploration Company, Inc. and Wynn Oil Company, and each of them, in the amount of \$1,714,571.41 with interest on the amount of said judgment at the rate of 10% per annum from and after May 11, 1979 until paid in full.

3. After application of the net revenues received from the original judgment date of May 11, 1979 to the date of special master's sale on July 5, 1979 and the application of the proceeds of special master's sale in accordance with this Court's judgment of May 11, 1979, and addition of interest on the judgment from May 12, 1979 to July 5, 1979 and credit for revenues from May 12, 1979 to July 5, 1979, there remains a deficiency in the judgment entered herein in favor of plaintiff and against the defendants Wynn Oil Company and Wynn Exploration Company, Inc., and each of them, in the amount of \$1,683,102.55, such sum to bear interest at the rate of 10% per annum from the date of sale of July 5, 1979 until paid in full.

4. This Court's judgment of May 11, 1979, in all other respects, be, and it hereby is, affirmed as required by the Mandate of the Court of Appeals of the State of New Mexico.

All Requested Findings of Fact and Conclusions of Law of the Parties inconsistent with those found or which are not adopted by the Court are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Bruce E. Kaufman
DISTRICT JUDGE

STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

CHAMBERS OF
BRUCE E. KAUFMAN
DISTRICT JUDGE
DIVISION IV

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April 23, 1982

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CHARLES D. OLMSTED, ESQUIRE
Post Office Box 669
Santa Fe, New Mexico 87501

RE: SOUTHERN UNION EXPLORATION COMPANY OF TEXAS v.
WYNN EXPLORATION COMPANY, INC., et al.; WYNN EX-
PLORATION COMPANY, INC., v. SOUTHERN UNION COM-
PANY, et al., 51726 Consolidated SF 77-1263

Gentlemen:

The Court in arriving at the Order, a copy of which is herein contained, has considered the evidence presented both orally and by stipulation, and documented both of the hearings held pursuant to the Motion for Judgment on the Mandate and the Defendants response and counter-motion thereto.

I acknowledge that the argument as advanced by Mr. Olmsted is intriguing to the extent that the Court of Appeals does appear to have suggested matters which were not raised on the appeal or at least in theory, varied from both the original Finding of the Court and the arguments advanced by counsel. On the contrary position, the language quoted by Mr. Ortega from the Court Opinion does seem to retrace to adopt a general finding precluding the relief sought by the Defendants.

Accordingly, it is my decision that the Judgment on the Mandate should be entered as updated and corrected, denying the relief sought by the Wynn interests and I will enter the Judg-

12a

ment on the Mandate in the form as tendered unless there are corrections which are necessary of implementation. Thank you for your consideration.

Very truly yours,

/s/ Bruce E. Kaufman
BRUCE E. KAUFMAN
DISTRICT JUDGE

BEK:mh

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 4168

SOUTHERN UNION EXPLORATION COMPANY,
Plaintiff-Counterdefendant,
Appellee-Cross-Appellant,
and

SOUTHERN UNION COMPANY,
Counterdefendant-Appellee,
v.

WYNN EXPLORATION COMPANY, INC. and
WYNN OIL COMPANY,
Defendants-Appellants,
Cross-Appellees,
and

R. C. WYNN,
Defendant-Cross-Appellee.

Consolidated

No. 4262

SOUTHERN UNION EXPLORATION COMPANY,
Plaintiff-Appellee,
v.

WYNN EXPLORATION COMPANY, INC.,
Defendant-Appellant.

(continued)

**APPEALS FROM THE DISTRICT COURT OF
SANTA FE COUNTY**

KAUFMAN, Judge

LEO J. HOFFMAN	COURT OF APPEALS OF
DAVID N. KITNER	NEW MEXICO
STRASBURGER & PRICE	FILED
Dallas, Texas 75250	JANUARY 13, 1981
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*Attorneys for Wynn Exploration,
Inc., Wynn Oil Company
and R. C. Wynn*

OPINION

Wood, Judge.

After almost 2,000 pages of pleadings (the record proper totals 3,900 pages), these oil business litigants finally framed the issues on which this case was tried in a third amended complaint, answer and counterclaim. After some 3,500 pages of trial proceedings, plus voluminous exhibits, the trial court's findings eliminated most of the legal theories asserted. It is unnecessary to catalog the various claims made because appellant, in Cause No. 4262, has abandoned that appeal, and the issues for decision in Cause No. 4168 are all based on a breach of contract. This Court's jurisdiction, however, is based on claims of fraud (tort claims) alleged in the third amended complaint and counterclaim. See § 34-5-8(A), N.M.S.A. 1978; *Citizens Bank v. C & H Const. Co. & Paving Co., Inc.*, 89 N.M. 360, 552 P.2d 796 (Ct.App. 1976).

SX (Southern Union Exploration Company) entered written agreements with one or more of the Wynn defendants for the exploration and development of oil and gas property. The Wynn defendants are R. C. Wynn, Wynn Oil (Wynn Oil Company) and Wynn X (Wynn Exploration Co., Inc.). Wynn Oil and Wynn X are Texas corporations; R. C. Wynn is the sole stockholder of each corporation. Payments due to SX pursuant to the agreements were not made; SX sued to collect those payments and to foreclose an operator's lien. The trial court entered judgment against Wynn Oil and Wynn X, and foreclosed the lien. The liability of Wynn X is not contested. The issues to be discussed are: (1) Apart from Wynn X, who is liable?; (2) the amount of the judgment; and (3) attorney fees.

Apart from Wynn X, Who is Liable?

(a) Issue Pled and Tried

Wynn Oil contends it cannot be held liable because liability of Wynn Oil under the agreements was neither pled nor tried. This contention is frivolous. R.Civ.Proc. 8(a) provides for notice pleading sufficient to enable the adverse party to answer and prepare for trial. *Malone v. Swift Fresh Meats Co.*, 91 N.M. 359, 574 P.2d 283 (1978). In paragraph 3 of the first cause of action, labeled Breach of Written Agreement, SX alleged that Wynn Oil was the alter ego of R. C. Wynn, but if Wynn Oil was not the alter ego of R. C. Wynn, then Wynn Oil was "directly liable for the damages set forth herein." The damages claimed were the failure to pay amounts due under the written agreements. Wynn Oil's answer denied liability under the agreements and, in an affirmative defense, alleged that Wynn Oil was not obliged to SX "by reason of any contract . . ." Wynn Oil had notice in the pleading of SX's contract claim. The contracts were introduced into evidence and the trial court made a finding as to the documents constituting the agreement. The contract claim against Wynn Oil was tried.

(b) Party to Contract

Wynn Oil claims it was not a contracting party. The trial court found that three documents constituted the contract. The first two of these documents — a letter agreement addressed to Wynn Oil and an operating agreement — show they were agreed to and accepted by Wynn Oil. These documents were executed on behalf of Wynn Oil by R. C. Wynn, President. The contents of these two documents provide a basis for the judgment against Wynn Oil.

R. C. Wynn testified that he never intended to make Wynn Oil a party to the agreement. The controlling intent of a party is his expressed assent and not his secret or

undisclosed intent. *State ex rel. Santa Fe Sand & G. Co. v. Pecos Const. Co.*, 86 N.M. 58, 519 P.2d 294 (1974); *Higgins v. Cauhape*, 33 N.M. 11, 261 P. 813 (1927).

R. C. Wynn also testified that the documents showing Wynn Oil as a contracting party were a mistake. Wynn Oil claims this testimony was uncontradicted. Wynn Oil is incorrect. A witness for SX who negotiated with R. C. Wynn concerning the contract and who directed the preparation of the documents, testified: "[M]y understanding that we had that Mr. Wynn wanted to put the deal in Wynn Oil Company's name . . ."

Wynn Oil claims the trial court committed manifest error in finding that Wynn Oil was a party to the agreement. In support of this argument, Wynn Oil reviews the evidence in the light most favorable to its position and, in effect, asks this Court to find the facts in its favor. Such is not proper. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct.App. 1971). The trial court determines the credibility and weight of the evidence; we review the evidence in the light most favorable to SX, the successful party. *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970).

The two documents signed by Wynn Oil, and the testimony of the SX witness concerning the negotiations and preparation of these documents are substantial evidence supporting the finding that Wynn Oil was a party to the contract.

(c) Admissions

Under this item (c) and in the following item (d), we discuss Wynn Oil's arguments that even though originally a contracting party, it was subsequently relieved of any obligation under the contract. These arguments involve the third document found by the trial court to be a part of the contract. This third document was signed by Wynn X.

Wynn Oil claims that in a post-trial brief, prior to findings, SX admitted that the third document substituted Wynn X for Wynn Oil as a contracting party. Wynn Oil also claims an admission by SX resulted from the way SX pleaded the third document in the third amended complaint, and Wynn Oil's admission in its answer that this allegation was correct. Assuming, but not deciding, that these two items can properly be characterized as admissions, what is the effect of the admissions?

Wynn Oil asserts that if unexplained or uncontradicted, the admissions were binding and conclusive upon SX, citing *Turner v. Silver*, 92 N.M. 313, 587 P.2d 966 (Ct.App. 1978), and that the admissions were neither contradicted nor explained. There are two answers to this argument.

First, *Turner v. Silver*, supra, expresses only the opinion of its author, Judge Sutin; other members of the panel did not join in Judge Sutin's opinion. Thus, with respect to the effect of admissions, *Turner* is not a decision of the Court of Appeals. *Casias v. Zia Co.*, 94 N.M. , 616 P.2d 436 (Ct.App. 1980). Judge Sutin's opinion is based on a Kansas decision. We apply New Mexico law. An admission in pleadings, or in testimony, is sufficient to support a finding. *Feldhut v. Latham*, 60 N.M. 87, 287 P.2d 615 (1955); *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct.App. 1972). However, an admission "is by no means conclusive. . . . [T]he admission is only one factor to be considered together with the other evidence." *Michael v. Bauman*, 76 N.M. 225, 413 P.2d 888 (1966). See also *Albright v. Albright*, 21 N.M. 606, 157 P. 662 (1916). If an admission was neither contradicted nor explained, the effect to be given the admission would depend upon the application of the uncontradicted evidence rule set forth in *Medler v. Henry*, 44 N.M. 275, 101 P.2d 398 (1940).

Second, the assumed admissions were contradicted by the express wording of the third document; this wording is set forth in item (d).

(d) Novation

Wynn Oil claims the third document of the contract amounted to a novation which substituted Wynn X for Wynn Oil as a contracting party. See *Dougherty, et al v. Van Riper*, 16 N.M. 600, 120 P. 333 (1911). Wynn Oil's argument that a novation was established by pleadings amounting to an admission was answered in (c) above. Wynn Oil contends that the trial court ruled on the question of novation by rejecting certain of its requested findings. Assuming, but not deciding, that the trial court did rule there was no novation, the question is whether, under the evidence, this ruling was wrong.

All of the documents to the contract were executed in Texas and the contract was formed there; Texas law applies. *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (Ct.App. 1968). Thus, we do not consider the non-Texas authorities relied on by Wynn Oil.

Russell v. Northeast Bank, 527 S.W.2d 733 (Tex.Civ.App. 1975) states:

To effect a novation by the substitute of one debtor for another and thereby release the first party, there must be an agreement to that effect between all three parties.

Ridgleawood, Inc. v. White, 380 S.W.2d 766 (Tex.Civ. App. 1964) states:

A requisite of novation is that parties to the previous contract and the new one agree that the obligations of the new be substituted for and operate as a discharge of the obligations of the first.

Allstate Insurance Company v. Clarke, 471 S.W.2d 901 (Tex.Civ.App. 1971) states:

Whether a subsequent agreement works a novation is a question of intention. For there to be a novation it

must clearly appear such was the intention of the parties. Novation is never presumed.

The third document, asserted to be a novation, is a letter agreement addressed to Wynn X by SX which was agreed to and accepted by Wynn X. As Wynn Oil correctly asserts: "No one executed this document on behalf of Wynn Oil. Manifestly, Wynn Oil was not a party to this agreement . . ." This third document made two changes in the agreement reflected by the first two documents of the contract. First, the share of costs and obligations to be paid to SX was reduced from 75 percent to 50 percent. Second, Wynn X, the addressee, was "desirous of the change in name of your Company from Wynn Oil Company to Wynn Exploration Company." This third document went on to state that the first letter agreement was amended accordingly, however the first letter agreement remained in full force and effect "except as herein specifically amended."

A letter exhibit requesting an assignment pursuant to a farmout agreement, which referred to this third document as "correcting" the first letter agreement, was signed by SX and Wynn X. R. C. Wynn's testimony concerning this third document can properly be understood as referring to R. C. Wynn's intentions as an individual and not as referring to the intentions of Wynn Oil.

The trial court could properly view the evidence as showing that Wynn Oil never agreed to be released, *Russell v. Northeast Bank*, supra; that the third document changed the corporate name but did not discharge Wynn Oil's liability, *Ridgleawood, Inc. v. White*, supra; and that SX, Wynn X and Wynn Oil never intended a novation, *Allstate Insurance Company v. Clarke*, supra. If the trial court did in fact rule on the question of novation by rejecting Wynn Oil's requested findings, we cannot hold, under the evidence, that the ruling was incorrect.

(e) Miscellaneous

The trial court found that by the third (change of name) document, Wynn Oil assigned its rights to Wynn X. This is incorrect because the document was not executed by Wynn Oil and there are no words of assignment in the document. This has no effect on the liability of Wynn Oil for its obligations under the first two documents.

The trial court's findings referred to Wynn Oil and Wynn X "jointly as Wynn." This joint reference provides no basis for a reversal inasmuch as Wynn X is not contesting its liability and inasmuch as Wynn Oil is liable on the basis of the documents it executed.

(f) Alter Ego

In its cross-appeal, SX contends the corporate veil of Wynn Oil and Wynn X should be pierced and liability should be imposed upon R. C. Wynn individually. SX's theory is that the two corporations are the alter ego of R. C. Wynn, that there is such a unity of interest and ownership between the corporations and R. C. Wynn that the corporations are no more than corporate shells utilized by R. C. Wynn to conduct his personal business, that R. C. Wynn has manipulated the assets and operations of the corporations "in an effort to make SX's judgment wholly or partly uncollectible," that the trial court's failure to pierce the corporate veil works an injustice and promotes fraud. See *Scott Graphics, Inc. v. Mahaney*, 39 N.M. 208, 549 P.2d 623 (Ct.App. 1976).

SX presents this argument by analyzing factors pertinent to a "piercing" decision. See *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal.App.2d 825, 26 Cal.Rptr. 806 (1962). In doing so, it proceeds in the same improper manner as did Wynn Oil in arguing that it was not a party to the contract — that is, by reviewing the evidence in the light most favorable to its position. The same SX witness

who testified that R. C. Wynn wanted the deal in Wynn Oil's name also testified that it made no difference to him whether the contracting party was R. C. Wynn or Wynn Oil. A permissible inference from this testimony is that SX knowingly dealt with a corporation in which R. C. Wynn owned the stock rather than with R. C. Wynn individually.

"A corporation and a stockholder, even though that stockholder be the owner of the vast majority of the stock, are separate entities." *London v. Bruskas*, 64 N.M. 73, 324 P.2d 424 (1958); see *Shillinglaw v. Owen Shillinglaw Fuel Company*, 70 N.M. 65, 370 P.2d 502 (1962). "[T]he corporate entity should be recognized and supported"; limited liability is the rule, not the exception. *Scott Graphics, Inc. v. Mahaney*, *supra*. Piercing the corporate veil by the device of the alter ego is an equitable remedy. *Associated Vendors, Inc. v. Oakland Meat Co.*, *supra*.

The trial court could properly view the evidence as establishing that SX knowingly contracted with Wynn Oil rather than R. C. Wynn individually, and that an asserted inability to collect all of its judgment from Wynn Oil was not a basis for relieving SX from a choice knowingly made. The trial court did not err in refusing to find R. C. Wynn individually liable to SX on an alter ego theory.

Amount of the Judgment

(a) The Issue of Excessiveness

Wynn Oil and Wynn X claim the amount of the judgment was excessive. SX contends the question of excessiveness was not preserved for review because the Wynn corporations neither moved to amend the judgment nor tendered specific findings as to the amount due. SX is incorrect. Requested findings were submitted on behalf of all of the Wynn defendants. Requested finding No. 29 was to the effect that SX had never supplied an accurate accounting

of the expenses incurred and that the accounting at the time of trial was deficient. This request sufficiently preserved for review the question of the amount of the judgment and the findings on which that amount was based. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967).

(b) Amount of Excessiveness

Wynn Oil and Wynn X claim the judgment is excessive by at least \$276,385.00 and by the computation of post-judgment interest. We do not attempt to calculate the amount of the excessiveness; that can be better done by the trial court with the assistance of counsel. The following paragraphs respond to the arguments under this issue, and these responses are to guide the trial court and counsel in recalculating the judgment and interest.

(c) Amount of the Liability for Costs and Expenses

The trial court found Wynn Oil and Wynn X liable for 50 percent of SX's costs and expenses. This percentage amount has not been disputed. The trial court concluded that Wynn Oil and Wynn X, as of November 1, 1978, owed SX \$1,879,791.22 and entered judgment for that amount on May 11, 1979. This is an incorrect sum.

First, the trial court found that \$279,707.78 of the judgment amount was unpaid interest through October 31, 1978. We discuss the interest question in subsequent paragraphs. Subtracting the interest item, the liability for costs and expenses should have been \$1,600,083.44. The trial court's finding, however, was for \$1,565,216.01. This discrepancy, of \$34,867.43, appears in SX's proof which shows this amount owed for operating costs and delay rental. We do not know whether the trial court intended to disallow the \$34,867.43 item; the discrepancy between the finding and the conclusion is to be resolved on remand.

Second, whether or not the trial court intended to disallow the \$34,867.43 item, the amount of costs and expenses

owed by the Wynn corporations is to be recalculated on remand in accordance with the operating agreement (previously referred to herein as the second document of the contract). Exhibit C to that agreement, a standardized form for "Accounting Procedure", provided that the operator, SX, was to bill the nonoperators, Wynn Oil and Wynn X "on or before the last day of each month for their proportionate share of costs and expenses for the preceding month. Such bills will be accompanied by statements reflecting the total charges and credits . . ." SX's proof was to the effect that as of October 31, 1978, the Wynn corporations had credits in excess of \$215,000.00. It is undisputed that this credit had not been applied against the amount SX claimed as due and, thus, the credits could not have been applied on a monthly basis as provided by the operating agreement.

(d) The Interest Rate

The trial court found that SX was entitled to interest at the rate of 10 percent per annum on the amount of costs and expenses due from the Wynn corporations, and unpaid. The Wynn corporations claim the interest rate should have been 9 percent. Paragraph 8 of the operating agreement authorized SX to demand and receive advance payments of estimated costs. Upon failure to pay an advance estimate within the time provided, "the amount due shall bear interest at the rate of nine percent (9%) per annum until paid." However, under the monthly billing provision in the "Accounting Procedure", "the unpaid balance shall bear interest monthly at the rate of ten per cent (10%) per annum . . ." The Wynn corporations contend these provisions are inconsistent. They are wrong. The 10 percent interest rate applied unless the amount unpaid was a billing for an advance estimate. The Wynn corporations do not claim any of the amount they owe SX was for advance estimates. The trial court correctly found that the interest rate on unpaid balances was 10 percent per annum.

(e) Calculating the Interest Rate

The operating agreement provided that the 10 percent annual interest rate was to be calculated on each unpaid billing and there is testimony that this was done. There is evidence that the total interest due, as of October 31, 1978, was \$279,707.78. To the extent this interest was calculated on a balance which should have been reduced by credits (see item c), it is excessive.

The trial court awarded, in a conclusion carried forward into the judgment, an improper interest amount between the October 31, 1978 date to which interest was figured, and the date judgment was entered. The judgment amount was for \$1,879,791.22. Of this amount, \$279,707.78 was interest. The judgment provides for "interest on such sum from November 1, 1978, until entry of this judgment, at the rate of 10% per annum, and thereafter interest on the judgment at the rate of 10% per annum until paid in full."

We are not concerned with the rate of interest. The unpaid balance bears interest at 10 percent pursuant to the contract; the judgment amount would also bear interest at 10 percent. See § 56-8-4, N.M.S.A. 1978 (1980 Cum.Supp.). Interest accrued to date of judgment may be properly included within the judgment amount. *O'Meara v. Commercial Insurance Company*, 71 N.M. 145, 376 P.2d 486 (1962). Any interest included within the judgment amount bears interest at 10 percent, but that is because the judgment bears interest.

The error was in allowing interest at 10 percent on the \$279,707.78 interest item from October 31, 1978 until entry of judgment on May 11, 1979. The contract provides only for simple interest and thus did not authorize interest on interest. SX does not point to any statute authorizing interest on interest, prior to entry of judgment. Absent either a contract or statutory provision authorizing interest on interest prior to judgment, such may not be recovered. See

Mississippi Valley Trust Co. v. Oklahoma Ry. Co., 156 F.2d 283 (10th Cir. 1946); Watkins & Faber v. Whiteley, 592 P.2d 613 (Utah 1979).

(f) SX contends any error resulting from findings insufficient to support the judgment amount, from failure to apply credits at the time provided in the contract, from calculating interest on amounts that should have been reduced by credits, and from calculating interest on interest prior to judgment was either waived or was corrected when the trial court approved the report of a special master's sale.

Wynn Oil superseded the judgment against it; Wynn X's interest in certain property was sold by a special master, and the special master's report was approved by the trial court.

Wynn Oil was not involved in the special master proceedings; those proceedings have no bearing on Wynn Oil's attacks on the amount of the judgment.

Neither the special master's report nor the order approving the report identify any errors in the judgment or purport to correct any such errors; rather, the improper judgment amount is utilized in both the report and the order. SX's brief attempts to show that the errors were corrected but fails in that attempt; the effect of the brief is to highlight the errors of calculation.

SX claims Wynn X waived any right to have the errors corrected by failing to appeal from the order approving the special master's sale. We disagree. Wynn X had appealed the propriety of the judgment prior to the special master's sale; its attack on the propriety of the judgment amount was not waived by not taking a second appeal involving the same issue.

(g) The judgment of liability against Wynn Oil and Wynn X, entered May 11, 1979, is affirmed. The cause is

remanded to the trial court to correct errors in the amount of the judgment and the references to the incorrect amount in the order approving the special master's sale. The correction is to be in accordance with the above discussion.

Attorney Fees

In its cross-appeal, SX contends the trial court erred in refusing to award it attorney fees.

(a) Basis for Attorney Fees

Absent an authorizing statute or rule of court, or the applicability of an exception such as those discussed in *Aboud v. Adams*, 84 N.M. 683, 507 P.2d 430 (1973), attorney fees are not recoverable. SX relies on § 36-2-39, N.M.S.A. 1978 which provides:

In any civil action in the district court . . . to recover on an open account, the prevailing party may be allowed a reasonable attorney fee set by the court, and taxed and collected as costs.

(b) Meaning of Open Account

"Open account" in § 36-2-39, *supra*, does not mean an amount owed on a single transaction. *Lujan v. Merhege*, 86 N.M. 26, 519 P.2d 122 (1974). Nor does it mean an account stated. *Tabet Lumber Company v. Chalamidas*, 83 N.M. 172, 489 P.2d 885 (Ct.App. 1971).

"Open account" was defined in *Gentry v. Gentry*, 59 N.M. 395, 285 P.2d 503 (1955) as follows:

[A]n account usually and properly kept in writing, wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently,

but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original, express, or implied intention, there is to be but one single and indivisible liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one party or the other, as the balance shall indicate at the time of settlement or following the last pertinent entry of the account.

This definition is the meaning of open account in § 36-2-39, *supra*. *Lujan v. Merhege*, *supra*; *Tabet Lumber Company v. Chalamidas*, *supra*.

(c) Was There an Open Account?

The Wynn corporations assert there could not be an open account in this case, citing Texas cases defining "open" and "sworn" accounts. The Wynn corporations argue that "[w]here the contract of the parties expressly defines their respective rights and obligations, no open account results." We reject this contention as too extreme.

Our view is that under the evidence the trial court could properly refuse to find an open account under New Mexico law, or a "sworn account" as defined by Texas law. See *Carter v. Hegar*, 595 S.W.2d 612 (Tex.Civ.App. 1980); Tex. Rev. Civ. Stat. Ann. art. 2226 (Vernon). The evidence which supports this refusal is found in the terms of the contract, specifically, the operating agreement and the attached "Accounting Procedure". See *Carter v. Hegar*, *supra*; *French v. Joseph E. Seagram & Sons, Inc.*, 439 S.W.2d 448 (Tex.Civ.App. 1969).

New Mexico's definition of open account, *Gentry v. Gentry*, *supra*, requires "a connected series of debit and credit

entries of reciprocal charges and allowances," an account to be "kept open and subject to a shifting balance . . . until it shall suit the convenience of either party to settle and close" with "but one single and indivisible liability arising from such series . . . fixed . . . as the balance shall indicate at the time of settlement or following the last pertinent entry . . ." This is the generally accepted definition of "open account" most frequently found in American case law. See 1 Tex.Jr.3d *Accounts and Accounting*, §§ 2 and 3 (1979) at 123; 1 Am.Jur.2d *Accounts and Accounting*, § 4 (1962) at 373, and cases therein cited.

The operating agreement was for 90 days and as long thereafter as specified conditions existed; liability accruing under this term could not be settled or closed at the convenience of the parties.

The Accounting Procedure negates a one, single and indivisible liability fixed at the time of settlement. Rather, the Accounting Procedure provides for monthly billings to be paid within fifteen days after receipt of the bill and thus contemplates divisible liabilities.

The Accounting Procedure provides for adjustments and reaches (we need not consider whether this reach was successful) for an account stated by a provision that a bill (any monthly bill) "shall conclusively be presumed to be true and correct" absent written exceptions to the bill within a specified time period.

The trial court did not err in refusing SX's requested finding that there was an open account. There being no open account, § 36-2-39, *supra*, did not authorize attorney fees. With this result, we need not consider other arguments presented on the question of attorney fees.

The judgment of liability having been affirmed, the cause is remanded for further proceedings in connection with the amount of the judgment, as previously specified. Each party is to bear his own costs.

IT IS SO ORDERED.

JOE W. WOOD

Judge

WE CONCUR:

RAMON LOPEZ, J.

MARY C. WALTERS, J.

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF SANTA FE

No. 51726 Consolidated SF 77-1263

Filed on 5-11-79

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et al.,
defendants,

WYNN EXPLORATION COMPANY, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN
UNION SUPPLY COMPANY and SUPRON
ENERGY CORPORATION, formerly
Southern Union Production Company,
Defendants.

DECISION OF THE COURT

The Court, having heard the evidence and the arguments of counsel, and having considered the Requested Findings of Fact and Conclusions of Law submitted by Southern Union Supply Company, now known as Southern Union Exploration Company, Southern Union Company, Wynn Exploration Company, Inc., Wynn Oil Company and R. C. Wynn, now renders the following decision:

FINDINGS OF FACT

1. Southern Union Supply Company, the Plaintiff in this case, has changed its name to Southern Union Exploration Company and hereinafter will be referred to as Southern Union Exploration Company. Southern Union Exploration Company is a corporation duly organized and existing under the laws of the State of Delaware and is authorized to do business in the State of New Mexico and has a valid and separate corporate existence from that of Southern Union Company.

2. Wynn Oil Company and Wynn Exploration Company are corporations organized under the laws of the State of Texas. R. C. Wynn, a resident of Santa Fe County, New Mexico, is the sole stockholder of Wynn Oil Company and Wynn Exploration Company. The registered office and registered agent of each corporation is the Corporation Company, P.O. Box 737, Santa Fe, New Mexico 87501. Wynn Oil Company and Wynn Exploration Company, Inc. will hereinafter be referred to jointly as Wynn.

3. Southern Union Exploration Company and Wynn entered into an agreement to explore and develop certain oil and gas leases in Lea County, New Mexico, such leases hereinafter referred to as the Gallagher Prospect and being located on the following described property:

Sections Eight (8) and Seventeen (17)
and the East One Half (E $\frac{1}{2}$) of Section
Eighteen (18), Township Seventeen South
(T-17-S), Range Thirty Four East
(R-34-E), Lea County, New Mexico.

4. The letter agreement of September 8, 1975, (Plaintiff's Exhibit No. 1), the Operating Agreement (Plaintiff's Exhibit No. 3), and the letter agreement of November 18, 1975 (Plaintiff's Exhibit No. 4) were all made and entered into in Dallas, Texas, and constitute the entire agreement

between Southern Union Exploration Company and Wynn as to the Gallagher Prospect.

5. Wynn Oil Company was a party to all agreements with Southern Union Exploration Company regarding the Gallagher Prospect. Wynn Oil Company assigned its rights in the Gallagher Prospect to Wynn Exploration Company by the letter agreement of November 18, 1973, but the letter agreement was not intended by the parties to release Wynn Oil Company from its obligations to Southern Union Exploration Company regarding the Gallagher Prospect.

6. The Operating Agreement was intended by Southern Union Exploration Company and Wynn to apply to all wells drilled on the Gallagher Prospect.

7. Wynn agreed to the drilling and completion of all wells on the Gallagher Prospect except the Supco State No. 1 well.

8. In accordance with the agreements of the parties, Southern Union Exploration Company drilled, completed or operated the following wells on the Gallagher Prospect: Gallagher State 8-2, Gallagher State 8-3, Lea-C-State; Pennzoil State No. 1; Supco State No. 1 and Supco State No. 2.

9. Southern Union Exploration Company, in drilling, completing and operating the wells on the Gallagher Prospect (to which Wynn consented), incurred expenses in the total amount of \$3,130,432.02 through October 31, 1978, all of which expenses were reasonable, necessary and proper for the prudent development of the property.

10. In accordance with the agreements between Wynn and Southern Union Exploration Company, Wynn is obligated to pay one-half of all expenses incurred in the drilling, completion and operation of the wells to which Wynn was a consenting party.

11. Although statements and invoices for charges incurred by Southern Union Exploration Company in the drilling, completion and operation of the wells were sent to Wynn, Wynn has failed and refused to pay any of its share of such expense.

12. Wynn's share of the expenses incurred by Southern Union Exploration Company in the drilling, completion and operation of the wells to which Wynn was a consenting party is \$1,365,216.01 through October 31, 1978.

13. In accordance with the Operating Agreement, Southern Union Exploration Company is entitled to interest at the rate of 10% per annum of Wynn's unpaid share of the expenses, such interest amounting to \$279,707.78 through October 31, 1978.

14. There was no agreement between Southern Union Exploration Company and Wynn to list, publish, give evidence to others or show Wynn as co-owner or co-operator of the wells.

15. Wynn did not suffer any damages as a result of not being listed or shown as a co-owner or co-operator of the wells.

16. Southern Union Exploration Company's use of the Keil process in completing the Pennzoil State No. 1 well did not constitute either ordinary or gross negligence.

17. Southern Union Exploration Company drilled, completed and operated the wells in a good, prudent and workmanlike manner and was not guilty of any ordinary or gross negligence in the drilling, completion and operation of the wells.

18. Wynn did not suffer any damages as a result of Southern Union Exploration Company's drilling, completion and operation of the wells.

19. Southern Union Exploration Company did not breach any fiduciary duties, contractual duties or duties of ordinary care to Wynn with respect to the drilling, completion, operation or marketing of production from the wells.

20. Southern Union Exploration Company was not negligent and did not act in bad faith or in a reckless or wanton manner in filing or processing an application with the Federal Power Commission to market the gas from the wells in interstate commerce or in not marketing the gas pending approval of such application.

21. Southern Union Exploration Company has prudently and timely marketed the production from the wells.

22. Wynn did not suffer any damages as a result of Southern Union Exploration Company's filing an application with the Federal Power Commission to market the gas from the wells in interstate commerce or as a result of Southern Union Exploration Company's not marketing the gas pending approval of such application.

23. The agreements between Southern Union Exploration Company and Wynn did not contemplate, nor were they intended to extend to properties other than those specifically described. Southern Union Exploration Company and Wynn did not enter into any other agreements to explore or develop any other oil and gas reserves. No fiduciary relationship existed between Southern Union Exploration Company and Wynn by virtue of their agreements or activities.

24. Wynn never elected to take over the drilling, completion or operation of any of the wells.

25. Southern Union Exploration Company and Wynn did not enter into any agreement to allow Wynn to operate the Gallagher State 8-2.

26. The information obtained by Southern Union Exploration Company in drilling, completing and operating the

wells was provided or made available to Wynn or was equally available to Wynn as to Southern Union Exploration Company.

27. Southern Union Company and Southern Union Exploration Company have not allowed their corporate purposes to overshadow the agreement between Southern Union Exploration Company and Wynn.

28. Wynn did not suffer any damages as a result of any acts or omissions of either Southern Union Company or Southern Union Exploration Company in any way related to the events or transactions involved in this case.

29. Southern Union Company and Supron Energy Corporation did not intentionally or otherwise interfere with Southern Union Exploration Company or its agreement with Wynn.

30. Southern Union Company and Southern Union Exploration Company did not combine, contract or conspire to shut in the wells and did not restrict trade and did not limit or control the quantity of oil and gas produced from the wells.

31. Southern Union Exploration Company did not make any misrepresentations or commit any fraud upon Wynn during or after negotiations concerning the Gallagher Prospect.

32. Southern Union Exploration Company performed all of its obligations to Wynn as required by the agreements relating to the Gallagher Prospect.

33. Southern Union Exploration Company has provided an accounting to Wynn as required by the Operating Agreement.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as a matter of law as follows:

1. This Court has jurisdiction over the parties and subject matter of this action.

2. The doctrine of forum non conveniens alleged by the Wynn defendants is not applicable to the circumstances of this action.

3. Wynn was in breach of the agreements with Southern Union Exploration Company in failing to pay its share of the expenses incurred by Southern Union Exploration Company in drilling, completing and operating the wells.

4. Southern Union Exploration Company is not the alter ego of Southern Union Company.

5. The Operating Agreement applies to all wells drilled on the Gallagher Prospect.

6. Southern Union Exploration Company, as operator of the wells, has no liability to Wynn, as non-operator, for losses sustained, or liabilities incurred, except such as result from gross negligence. The standard of care of gross negligence as applied to the actions of the operator in this case is not against public policy and is valid and enforceable.

7. Southern Union Exploration Company has a valid and enforceable call on all natural gas produced from the wells as provided in the Operating Agreement. The call on gas is not vague, ambiguous or indefinite or against public policy.

8. Southern Union Company and Southern Union Exploration Company did not violate any provisions of the laws of the State of New Mexico relating to antitrust, monopolies or restraints of trade in connection with the drilling, completion or operation of the wells or marketing of production from the wells.

9. The evidence presented by Southern Union Exploration Company in this action constitutes an adequate and

proper accounting to Wynn of the income and expenses relating to the wells through October 31, 1978.

10. Wynn did not prove by a preponderance of the evidence any of its affirmative defenses to Southern Union Exploration Company's Third Amended Complaint.

11. Wynn failed to prove by a preponderance of the evidence any of the material allegations contained in its Complaint and Counterclaim against Southern Union Exploration Company, Southern Union Company and Supron Energy Corporation, and accordingly, the causes of action contained therein should be dismissed with prejudice.

12. Southern Union Exploration Company has a valid, subsisting, first and preferred operator's lien under the Operating Agreement as to Wynn's interest in the real and personal property and the proceeds from the wells located on the Gallagher Prospect.

13. Southern Union Exploration Company is entitled to judgment against Wynn Exploration Company and Wynn Oil Company in the amount of \$1,879,791.22, plus interest on such sum from November 1, 1978, at the rate of 10% per annum until paid in full, foreclosure of its operator's lien and costs of this action.

All Requested Findings of Fact and Conclusions of Law of the Parties inconsistent with those found or which are not adopted by the Court are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BRUCE E. KAUFMAN

District Judge

[SEAL]

STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

Chambers of
Bruce E. Kaufman
District Judge
Division IV

March 19, 1979

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Re: Southern Union Supply
Co., et al. v. Wynn
Exploration Co., et al.:
Cause No. 51726

Gentlemen:

In arriving at the court's opinion on the issues in this case I have considered the pleadings and responses as amended, the evidence received orally at trial and the exhibits and documents properly received in evidence, the arguments on the law and legal memoranda submitted by counsel as well as independent research attempted by my-

self on issues raised during the proceedings. As may be apparent by virtue of the delay and (sic) the rendering of this decision, I have to some extent sought to review my own notes and materials gathered during the trial to the extent that it is possible to do so with the interruptions normally attended to in day to day routines. I am satisfied that I have as thoroughly reviewed the materials pertinent to this decision as is possible and therefore render this opinion directed toward ultimate findings and conclusions and judgment in this cause.

After all of the research and arguments touching upon technical matters which have been received and reading many materials, some cited, some not cited, I must return to a matter of original impression that after all is said and done the case is one basically of contract law principles.

Having considered all of the testimony in light of legal far afield (sic) in my own independent research, I ultimately return to the conclusion and judgment that there is virtually no issue of law raised in this case that could not have been decided by reference to a contract horn book. It is true as was argued, that to a large extent the matters herein must be determined by believability or credibility of testimony considered in the entire context of evidence, conversations and exchanges which took place, as well as customs and practices of the industry and other considerations which arise in day to day commerce in the oil and gas industry, bear on the conclusion reached (sic).

Initially, my conclusions are that negotiations which did occur between Haseltine and Wynn were largely predicated upon knowledge held by one individual of another but were nonetheless reduced to formal writings and indeed informal understandings on the basic (sic) of corporate undertakings. This is to say, that while Wynn claims certain things were done by him principally in reliance of Haseltine and Haseltine indicates that he was dealing with Wynn (the

individual) that nonetheless both in their original writings (and later corrected contracts) each of the parties was dealing with the other on a business format or corporate basis.

Certain of the errors or clerical misprisions (which ever one chooses to regard them as) were nonetheless, it seems to me, rather routinely accepted and corrected in formal written form or at least by the conduct of the parties subsequently, and to that extent ratified in reliance upon what appeared to me, well understood terms and conditions sought to be incorporated in the original agreement and modified to some extent thereafter.

The letter of September 8th, acted upon apparently on the 4th of October, 1975, by Wynn and the operating agreement, the receipt of which was in dispute but which was in any event signed, appeared to me to predicate the basis for the agreement and must be the documents from whence flowed the legal consequence without substantial variance.

It seems clear to me viewing with the benefit of hindsight and perspective perhaps not afforded the parties, the initial basis could have been better set forth in greater detail and that notices issuing and responses thereto should have been done in a more orderly fashion. However, I recognize that in the day to day course of business, many of these things are not viewed as crucial to the on-going flow of business and not particularly noted, therefore subsequent conduct of the parties in reliance upon their prior judgment becomes of increasing import as to the manner in which the parties did view actions taken, affirmed or ratified.

With the exception of the Supco Number One Well upon which the notice was clearly inappropriate under the terms of the original agreement or understanding, I believe that the evidence must weigh on behalf of the plaintiff to the extent that Wynn was in fact a willing participant in each of the drilling operations.

Whether or not one views the agreement as having created a joint venture, there was certainly the *opportunity* for certain mutual exercise of control or taking over of operations at one phase or another. This Wynn apparently never did, and it seems by virtue of the evidence produced at trial, he did attempt to belatedly document expressions of interest in becoming operating partner. In other words, Wynn had the opportunity to exercise certain prerogatives which in fact it is not documented that he did so employ.

Defendant Wynn Companys' (sic) did pursue the matters and all outward communications reflected continuing participation and interest upon the part of the Wynn defendants.

I cannot find any evidence before me, that plaintiff's (sic) Southern Union Exploration did in fact breach any right of Wynn either in initially commencing drilling or to take (sic) over operation of any of the ventures pursued. Other than the obvious overlooking of the Supco One notice the evidence is entirely to the contrary.

Because of the nature and substance of the agreement which I previously indicated I viewed as a contract matter between consenting parties, in effect as corporate partners, I do believe that either of the parties was entitled upon appropriate notice and proper form to an accounting one from the other. Again, it would seem that the accounting practices initially applied in this matter were not destined to clearly reflect the day to day transactions. By the time this matter came to trial it is apparent that this had been corrected and that the reporting aspects of daily operations together with a recapitulation type statement are readily available. I therefore believe that it is appropriate that Wynn have an accounting showing precisely what the totality of his involvement and obligations was and is as of the current time. In effect, it may well be that the evidence produced at trial from the various representatives of each of the parties, and particularly the fiscal officer of the

defendant Southern Union Company, has been provided. If that is not sufficient, however, I would direct that the information provided as to the total picture of the financial obligations of the parties be rendered in a simplistic letter form stating what the commitment and balances of the parties are with regard to their respective interests and have the underlying vouchering material available for inspection by Wynn at a mutually agreed time and place.

With respect to the claims that notwithstanding notice to Wynn and his chance to participate that the Southern Union Exploration's work was done on a basis that was either negligent, grossly negligent or otherwise improper, this aspect of the case took far more time in receipt that I am prepared to give it in the rendition of an opinion. The testimony received on behalf of both parties was impressive. One cannot certainly overlook the testimony received from the Wynn witnesses any more than one can lightly discard the testimony of the company employees and people in the industry that were produced by Southern Union.

After all that is said and done this is still a court of law to be governed by not only the credibility of the evidence but the propriety of actions occurring at past times based on information then available.

I cannot find that the explorations, while they might otherwise be done today, were in fact so negligent, grossly negligent or otherwise improper so as to afford either a defense to or an action by the Wynn defendants against Southern Union Exploration. Whether it was a neglect of research in advance, the obtaining of information or the manner and form of the treatments, I must find that no activities so undertaken were so grossly deficient or widely neglectful so as to in any fashion predicate the claims either in defense or counterclaim on behalf of Wynn.

The testimony on the issue of the FPC and "intra" state marketing or "inter-state" marketing while positing interesting theories which might or could have underlain the considerations of Southern Union in seeking to formulate and operate this agreement, are to me as produced in evidence no more than that simply intriguing theories which are factually unsupported in evidence received by the court.

I have not overlooked the fact that parent company of the plaintiff is in fact a public utility and that the standards applicable there are indeed to some extent different than those which might apply to a purely public but non utility type gas and petroleum exploration or marketing company. I find that none of the standards urged by defendant Wynn affects the manner or course of their conduct or legal consequences flowing therefrom.

I also indicate that whether the standard as observed above was one of negligence, reckless professional disregard, or misconduct or gross negligence that the defendant Southern Union has not breached any of the standards which I find to be here applicable.

With the foregoing recitations, it is not necessary to consider the application for recession (sic) for false representations as prayed and that application of the plaintiff will be denied. The balance of the claims by the Wynn interest including the call on the gas and marketing the gas which are intertwined with the other contractual theories of counterdefendant, I find are not supported by sufficient evidence to warrant further consideration and will dismiss them denying the relief prayed.

While there is a clear conflict as to the exchanges orally, the weight of the evidence seems to me clearly to be on the side of the plaintiff, Southern Union Exploration and I cannot find any overriding testimony to the degree necessary to negate the clear agreement which I have recited above, therefore, the claim for relief on that basis by the counterclaimant is respectfully denied.

With respect to the various discussions of intermingled corporate purpose "overshadowing" purposes or the alter ego theories, these are again intertwined with both the contractual theory of the case, alleged misrepresentations or inactions and acts said to have been neglectful or imprudently done. As has often been said corporations act only through their individual employees, officers and agents. While the counterclaim pleadings do not go as far as to claim fraud they do claim improper activity to the extent that it would have to be established by clear and convincing evidence in my view, to so sustain such a cause of action. I can find no such proof accordingly, the claim for alleged corporate overshadowing is denied.

Having found that the basic action herein is a contractual one which was in fact breached by the legal contracts, I will award judgment based on the foregoing recitations against the principle (sic) corporate defendants as named in the amended pleadings. I have also above stated, that the nature of the relationship was one of between (sic) agreeing partners of corporate character much in the nature of a joint-venture undertaken. Accordingly, I cannot find that it was an open account but can find that interest should be assessed by virtue of the apparent wilful delay in the acknowledgment of a legitimate debt passed (sic) due. The provision for collection of attorney fees, however, I cannot accede to because of the recitations as just made. I will therefore assess judgment in the sum of \$1,879,791.22 as adduced by the proof of the fiscal officer during his testimony, will deny the application for attorneys fees but will award costs on behalf of the plaintiff, Southern Union Supply Company. The judgment shall lie against both Wynn Exploration and Wynn Oil Companies but not against R. C. Wynn individually. All counterclaims as submitted and not otherwise specifically enumerated in the foregoing recitations are respectfully denied and the defendant Wynn interests shall take nothing by their counterclaims.

Parties requiring further clarification of the foregoing recitation may address themselves specifically at the court for such clarification with copies of the inquiry noted to opposing counsel.

Thank you for your consideration and patience.

Very truly yours,

BRUCE E. KAUFMAN

Bruce E. Kaufman

District Judge

BEK:maf

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 51726

'82 APR 27

Consolidated SF 77-1263

SOUTHERN UNION EXPLORATION COMPANY
OF TEXAS, a Delaware corporation,

Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et. al.,

Defendants,

WYNN EXPLORATION COMPANY, INC.,

Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN UNION
SUPPLY COMPANY and SUPRON ENERGY
CORPORATION, formerly Southern Union
Production Company,

Defendants.

JUDGMENT ON THE MANDATE

This matter coming on for hearing on the motion of the plaintiff, Southern Union Supply Company, later known as Southern Union Exploration Company and now known as Southern Union Exploration Company of Texas, for judgment on the mandate, and the Court being fully advised in the premises, find and concludes that the mandate from the Court of Appeals of New Mexico was filed in this court on February 24, 1981 and that a petition for certiorari by the defendant Wynn Oil Company was denied by the Supreme Court of New Mexico on February 18, 1981, that thereafter a motion by defendant Wynn Oil Company for reconsideration of the Supreme Court's denial of certiorari was denied on July 22, 1981 and that thereafter a second motion by defendant Wynn Oil

Company for reconsideration of the Supreme Court's denial of certiorari was denied on August 26, 1981. The Court finds and concludes that the \$34,867.43 items mentioned in the Opinion of the Court of Appeals should be allowed and that there is justly due and owing by the defendants Wynn Exploration Company, Inc. and Wynn Oil Company, through October 31, 1978, before calculation of interest on a monthly basis and deduction for revenues received on a monthly basis, the sum of \$1,600,083.44 for the drilling, completion and operation of the wells in issue in this cause to which Wynn Exploration Company, Inc. and Wynn Oil Company were consenting parties.

The Court further finds and concludes, that after calculation of interest on a monthly basis and credit for revenues received in a monthly basis, in accordance with the mandate of the Court of Appeals of the State of New Meico that the amount of the judgment of this Court entered in this cause on May 11, 1979 should be \$1,714,571.41.

The Court further finds and concludes that the proper application of the proceeds of the special master's sale of the interest of Wynn Exploration Company, Inc. in the property in issue is as follows:

Total Amount Paid by Plaintiff at Sale	\$50,000.00
Costs and Expenses of Sale	\$ 485.25
Special Master's Fee	\$ <u>2,000.00</u>
Balance Applied to Judgment and Debt . . .	<u>\$47,514.75</u>

The interest accrued on the judgment from May 12, 1979 until the special master's sale on July 5, 1979, revenue credits accrued from May 12, 1979 until the special master's sale on July 5, 1979 and the application of the amounts bid by the plaintiff at the special master's sale are:

Interest on Judgment Amount of \$1,714,571.41 for Period 5/12/79 to 7/5/79	\$ 25,836.01
Less Revenue Received 5/12/79 to 7/5/79	\$ <u>9,790.42</u>
Interest on Judgment Amount of \$1,714,571.41 Unpaid as of 7/5/79	\$ <u>16,045.59</u>
Proceeds of Sale Applied to Interest After Expenses of Sale	\$ 16,045.59
Proceeds of Sale Applied to Principal After Expenses of Sale	\$ <u>31,469.16</u>
Total	\$ <u>47,514.75</u>
Judgment	\$1,714,571.41
Less Proceeds of Sale Applied to Principal	\$ <u>31,469.16</u>
Deficiency as of 7/5/79	\$ <u>1,683,102.55</u>

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Southern Union Supply Company, later known as Southern Union Exploration Company and now known as Southern Union Exploration Company of Texas, be, and it hereby is, granted judgment on the mandate against the defendants Wynn Exploration Company, Inc. and Wynn Oil Company, and each of them, in the amount of \$1,714,571.41 with interest on the amount of said judgment at the rate of 10% per annum from and after May 11, 1979 until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that after application of the net revenues received from the original judgment date of May 11, 1979 to the date of sale on July 5, 1979 and the application of the proceeds of sale in accordance with this Court's judgment of May 11, 1979, and addition of interest

on the judgment from May 12, 1979 to July 5, 1979 and credit for revenues from May 12, 1979 to July 5, 1979, there remains a deficiency in the judgment entered herein in favor of plaintiff and against the defendants Wynn Oil Company and Wynn Exploration Company, Inc., and each of them, in the amount of \$1,683,102.55, such sum to bear interest at the rate of 10% per annum from the date of sale of July 5, 1979 until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court's judgment of May 11, 1979, in all other respects, be, and it hereby is, affirmed as required by the mandate of the Court of Appeals of the State of New Mexico.

/s/ Bruce E. Kaufman
DISTRICT JUDGE

SUBMITTED:

STRASBURGER & PRICE
MONTGOMERY & ANDREWS, P.A.

By /s/ Victor R. Ortega
VICTOR R. ORTEGA

Attorneys for Southern Union Supply
Company later known as Southern
Union Exploration Company and now
known as Southern Union Exploration
Company of Texas

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF SANTA FE

No. 51726 Consolidated SF 77-1263
Filed on 5-11-79

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et al.,
Defendants,

WYNN EXPLORATION COMPANY, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN
UNION SUPPLY COMPANY and SUPRON
ENERGY CORPORATION, formerly
Southern Union Production Company,
Defendants.

JUDGMENT

This cause having come on for trial before the Court sitting without a jury, and the Court having heard the testimony of the witnesses and having considered all of the evidence submitted at the trial and having considered

the arguments and briefs submitted by counsel and having made its decision herein and entered its Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, granted judgment against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, in the amount of \$1,879,791.22, plus interest on such sum from November 1, 1978, until entry of this judgment, at the rate of 10% per annum, and thereafter interest on the judgment at the rate of 10% per annum until paid in full.

2. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be and hereby is, awarded its costs against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company.

3. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, adjudged and declared to have a valid, subsisting, first and preferred operator's lien under the Operating Agreement upon, against and applicable to any and all interest of the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, in the following described land located in Lea County, New Mexico:

Sections Eight (8) and Seventeen (17) and the East One Half (E ½) of Section Eighteen (18), Township Seventeen South (T-17-S), Range Thirty-Four East (R-34-E), Lea County, New Mexico,

and in all rights, properties, assets and interests appurtenant to such land, including, but not limited to, any and all interest of such Defendants in all oil, gas and other minerals in, on and under such land, and in all oil, gas and other minerals produced from such land and in the value and proceeds thereof, and in all wells, materials, equipment,

fixtures and personal property located on or acquired for use on such land, such lien to secure the payment of all sums awarded to Plaintiff under this judgment, including interest and the costs of this action.

4. That the said operator's lien awarded to Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, ordered foreclosed and the above described interest of the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, be, and it hereby is, ordered sold in accordance with the law of the State of New Mexico to satisfy this judgment and all sums due under it, and the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, be, and they hereby are, forever foreclosed, barred and estopped from having or claiming to have any right, title, interest, or lien superior to the lien of Plaintiff in and to the above described property.

5. That Sumner G. Buell be, and he hereby is, appointed as a Special Master by the Court to sell the interest of the Defendants, Wynn Exploration Company, Inc., and Wynn Oil Company, in and to the said above described property. The sale shall take place on the 20th day of June, 1979, at 10:00 a.m. (or on such later date as may be ordered by this Court) at the Lea County Courthouse in Lea County, Lovington, New Mexico. The Special Master shall, upon confirmation of the sale by this Court, issue a Special Master's Deed and Bill of Sale to the purchaser of the interest ordered sold hereunder.

6. The foreclosure and sale shall be in accordance with the provisions of the law of New Mexico relating to such matters, to-wit: Section 39-5-1 through 39-5-23, N.M.S.A. 1978, inclusive, and the parties to this action may bid and purchase at such sale. The Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration

Company, may bid all, or any portion of, the judgment awarded herein at the sale.

7. That the proceeds of said sale be applied first to the expenses of the sale and then to the amounts due Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, such sums to be applied first to accrued interest and then to principal. If the proceeds of the sale are insufficient to satisfy said sums due to the Plaintiff, then this judgment shall be effective against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, with respect to the amount of any such deficiency and execution shall issue against the assets of said Defendants for such deficiency.

8. That all actions and all counterclaims and complaints of the Defendant, Wynn Exploration Company, Inc., against the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, and against Supron Energy Corporation, formerly Southern Union Production Company, and Southern Union Company be, and they hereby are, dismissed with prejudice.

9. That Supron Energy Corporation, formerly Southern Union Production Company and Southern Union Company, be, and they hereby are, awarded their costs against the Defendant, Wynn Exploration Company, Inc.

10. That the application for attorneys' fees by the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and the same hereby is, denied.

Dated this 11th day of May, 1979.

BRUCE E. KAUFMAN

District Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 14862

WYNN OIL COMPANY,

Petitioner.

VS.

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE NEW
MEXICO COURT OF APPEALS**

STEPHENSON, CARPENTER, CROUT & OLMSTED
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WILLIAM P. TEMPLEMAN
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Santa Fe, New Mexico 87504-0669
(505) 982-4611

Attorneys for Petitioner
Wynn Oil Company

March 30, 1983

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 14862

WYNN OIL COMPANY,

Petitioner.

vs.

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE NEW
MEXICO COURT OF APPEALS**

Pursuant to Rule 28 N.M.R.App.P. (Civ.) and § 34-5-14 NMSA (1978), petitioner Wynn Oil Company ("Wynn Oil") hereby petitions this Court for its writ of certiorari to review the decision of the New Mexico Court of Appeals, dated March 10, 1983, in *Southern Union Exploration Co. v. Wynn Oil Co.*, No. 5795 (annexed hereto as Exhibit A—the "Second Opinion"), and the earlier opinion of the Court of Appeals, dated January 13, 1981, in the same case, Nos. 4168 and 4262 consolidated (annexed hereto as Exhibit B—the "First Opinion"). As reasons for granting this petition, Wynn Oil states:

* * *

4. THE BASES FOR GRANTING THE WRIT

This petition invokes this Court's certiorari jurisdiction as to both the First and Second Opinion on all four of the grounds provided in § 34-5-14 NMSA (1978)—namely, because both opinions of the Court of Appeals conflict with the decisions of this Court, because the opinions conflict with each other, because the Second Opinion's construction of the First Opinion violates constitutional due process, and because these conflicts raise issues of substantial public interest respecting the judicial process which should be determined by this Court.

a. The Second Opinion

The trial court's first judgment held Wynn Oil *jointly* liable with Wynn X for 50 percent of the cost of the five wells on the sole theory that, pursuant to the *Third Document*, Wynn Oil was the "unreleased assignor" of Wynn X and, therefore, was jointly liable for all wells in which only Wynn X elected to participate. The First Opinion destroyed this basis of Wynn Oil's liability, holding that "Wynn Oil was not a party to" the *Third Document*, that it "was not executed by Wynn Oil and there are no words of assignment in the document," and that it "has no effect on the liability of Wynn Oil for its obligations under the first two documents" (Ex. B, 541). The First Opinion, instead, held that "[t]he contents of [the *First* and *Second Documents*] provide a basis for the judgment against Wynn Oil" (*id.* 539) and that "Wynn Oil is liable on the basis of the documents it executed" (*id.* 541). The First Opinion plainly did not hold that Wynn Oil was *jointly* liable with Wynn X on the basis of the same contract. Finally, the First Opinion concluded that: "The judgment of liability having been affirmed, the cause is remanded for further proceedings in connection with the amount of the judgment, as previously specified" (*id.* 545).

The Second Opinion again held Wynn Oil *jointly* liable with Wynn X for 50 percent of the costs of the same five wells, ostensibly on law of the case grounds. In doing so, the Second Opinion either ignored or reversed the specific rulings of the First Opinion establishing that Wynn Oil is not liable on the *Third Document*.

* * *

By ignoring and reversing the actual rulings of the First Opinion respecting the *Third Document*, and by holding that its own subjective distortions of the First Opinion are the law of this case, the Second Opinion seeks to deny review of both opinions on the merits by this Court and, thus, to deny constitutional due process to Wynn Oil.

All above-described conflicts, due process violations, and violations of orderly judicial process raise issues of substantial public interest which should be determined by this Court.

* * *

The subjective test applied in the Second Opinion creates a trap for litigants and for this Court. If the First Opinion means what the Second Opinion now *claims* it says, then the First Opinion is plainly deceptive. For the actual language of the First Opinion clearly states that Wynn Oil is not bound by the *Third Document* and that the trial court's critical "assignment" theory is simply "incorrect" (Ex. B, 541). And Wynn Oil has been caught in a bizarre trap, in which the Court of Appeals has only revealed the hidden meaning of the First Opinion two years after it was rendered, when Wynn Oil may have no opportunity to argue the validity of that decision, and this Court may be precluded from reviewing that decision at the instance of Wynn Oil.

Such "Catch-22" jurisprudence requires this Court's immediate intervention. The Court of Appeals here has presumed to rewrite its own prior opinion, reversing the previous result which was favorable to Wynn Oil, and resolving critical issues contrary to its own previous judgment. Such result was achieved without trial, evidence, or, indeed, any legal theory which would support the result. The outcome is presented to Wynn Oil as a conclusive matter, and any further litigation is precluded. Obviously, the retroactive revision of matters which are *res judicata* denies due process under the Fourteenth Amendment to the unfortunate litigants, like Wynn Oil, who are caught in such a trap.

The Second Opinion creates the conclusive presumption that the remand directions state the entire substance of the First Opinion, and that none of the specific rulings in that opinion, which are favorable to Wynn Oil, need be considered. Such a presumption is so irrational that it violates Constitutional due process. See, e.g., *Elkins v. Moreno*, 435 U.S. 647 (1978);

Turner v. Department of Employment Security, 423 U.S. 44 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

* * *

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 14,862

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION
COMPANY OF TEXAS,

Respondent.

Certiorari To The New Mexico Court of Appeals

MOTION FOR REHEARING

COMES NOW WYNN OIL COMPANY, Petitioner in the above styled and numbered cause, and files this Motion for Rehearing of this Court's decision dated April 22, 1983 denying its Petition for Writ of Certiorari, and respectfully shows the Court the following:

I

In denying Wynn Oil Company's ("Wynn Oil") Petition for Writ of Certiorari, this Court overlooked or misapprehended the following points of law and fact:

1. The Court of Appeals violated the New Mexico doctrine of the law of the case and this Court's controlling decisions in *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978); *Spingola v. Spingola*, 93 N.M. 598, 603 P.2d 708 (1979); *State ex rel. Bujac v. District Court*, 28 N.M. 28, 205 P. 716 (1922); and others. The Second Opinion (Ex. A to Pet. for Writ of Cert.) holds that Wynn Oil is liable to Southern Union for more than a million dollars on the basis of a contract which another panel of the Court of Appeals had previously rejected as the basis of Wynn Oil's liability in the First Opinion.

The First Opinion (Ex. B. to Pet.) of the Court of Appeals: (a) rejected the basis of joint liability employed by the trial court against Wynn Oil; (b) found that Wynn Oil was separate-

ly liable on a contract different from the contract which binds Wynn X; and (c) "remanded for further proceedings in connection with the amount of the judgment." However, contrary to this Court's decision establishing the principles of the law of the case, another panel of the Court of Appeals refused to be bound by the specific holdings of the First Opinion, and affirmed a second judgment by the trial court which erroneously held Wynn Oil jointly liable on the same contract which binds Wynn X,—the very basis for liability rejected in the First Opinion.

The only basis for this nonsensical conclusion is the second panel's subjective impression of the thrust of the First Opinion, which is contradicted by the express contrary holdings in the First Opinion. For the second panel to disregard express rulings and confect "the law of the case" out of its own subjective imagination makes a mockery of this Court's decisions, such as *Gerety v. Demers*, *supra*, that the law of the case is contained only in express rulings.

Thus, the Court of Appeals has turned New Mexico's law of the case doctrine on its head—it refused to apply the law of the case when it was required to do so, and it distorted that doctrine to apply it when the doctrine was inapplicable. In so doing, the Court of Appeals rode roughshod over numerous decisions of this Court and undermined the fundamental procedural framework by which disputes are resolved in New Mexico. (Argued Point 1, Pet. for Writ of Cert.)

2. As a result of such judicial misconduct, Wynn Oil never received notice or an opportunity to be heard as to the basis upon which it has been found contractually liable for over two million dollars, instead of only approximately \$480,000 to date. The Court of Appeals, with no new evidence, has rewritten its First Opinion, reversing the previous result which was favorable to Wynn Oil, and resolved critical issues contrary to the plain rulings of the First Opinion. The Court of Appeal's indefensible interpretation of the First Opinion was not revealed to Wynn Oil until two years after the decision was rendered—

when it was presented as a conclusive matter with any further litigation precluded. Such retroactive revision of an appellate ruling trapped Wynn Oil and denied it due process in violation of the Due Process Clause of the 14th Amendment to the United States Constitution and Article 11, Section 18 of the New Mexico Constitution. (Argued Point 1, Pet. for Writ of Cert.)

3. The Second Opinion seems to have invented a conclusive presumption that the remand directions are the exclusive source of the law contained in the First Opinion, and that none of the specific rulings of that opinion which were favorable to Wynn Oil need be considered. Such a decision is not merely error; it is arbitrary, capricious, and in violation of established principles of law, and has denied Wynn Oil its constitutionally guaranteed substantive due process in violation of the above-cited Due Process clauses. (Argued Point 1, Pet. for Writ of Cert.)

A.A.P.L. FORM 610
MODEL FORM OPERATING AGREEMENT—1956
Non-Federal Lands

OPERATING AGREEMENT

DATED

September 15, 1975,

FOR UNIT AREA IN TOWNSHIP 17S, RANGE 34E, Lea
COUNTY, STATE OF New Mexico.

AMERICAN ASSOCIATION OF PETROLEUM LANDMEN
APPROVED FORM AAPL NO. 610 MAY BE ORDERED
DIRECTLY FROM THE PUBLISHER ROSS-MARTIN
COMPANY, BOX 800, TULSA 74101

* * *

12. OPERATIONS BY LESS THAN ALL PARTIES

If all the parties cannot mutually agree upon the drilling of any well on the Unit Area or upon the reworking, deepening or plugging back of a dry hole drilled at the joint expense of all parties or a well jointly owned by all the parties and not then producing in paying quantities on the Unit Area, any party or parties wishing to drill, rework, deepen or plug back such a well may give the other parties written notice of the proposed operation, specifying the work to be performed, the location, proposed depth, objective formation and the estimated cost of the operation. The parties receiving such a notice shall have thirty (30) days (except as to reworking, plugging back or drilling deeper, where a drilling rig is on location, the period shall be limited to forty-eight (48) hours exclusive of Saturday or Sunday) after receipt of the notice within which to notify the parties wishing to do the work whether they elect to participate in the cost of the proposed operation. Failure of a party receiving such a notice to so reply to it within the period above fixed shall constitute an election by that party not to participate in the cost of the proposed operation.

If any party receiving such a notice elects not to participate in the proposed operation (such party or parties being hereaf-

ter referred to as "Non-Consenting Party"), then in order to be entitled to the benefits of this section, the party or parties giving the notice and such other parties as shall elect to participate in the operation (all such parties being hereafter referred to as the "Consenting Parties") shall, within thirty (30) days after the expiration of the notice period of thirty (30) days (or as promptly as possible after the expiration of the 48-hour period where the drilling rig is on location, as the case may be) actually commence work on the proposed operation and complete it with due diligence.

The entire cost and risk of conducting such operations shall be borne by the Consenting Parties in the proportions that their respective interests as shown in Exhibit "A" bear to the total interests of all Consenting Parties. Consenting Parties shall keep the leasehold estates involved in such operations free and clear of all liens and encumbrances of every kind created by or arising from the operations of the Consenting Parties. If such an operation results in a dry hole, the Consenting Parties shall plug and abandon the well at their sole cost, risk and expense. If any well drilled, reworked, deepened or plugged back under the provisions of this section results in a producer of oil and/or gas in paying quantities, the Consenting Parties shall complete and equip the well to produce at their sole cost and risk, and the well shall then be turned over to Operator and shall be operated by it at the expense and for the account of the Consenting Parties.

* * *

22. LIABILITY OF PARTIES

The liability of the parties shall be several, not joint or collective. Each party shall be responsible only for its obligations, and shall be liable only for its proportionate share of the costs of developing and operating the Unit Area. Accordingly, the lien granted by each party to Operator in Section 9 is given to secure only the debts of each severally. It is not the intention of the parties to create, nor shall this agreement be construed

as creating, a mining or other partnership or association, or to render them liable as partners.

* * *

30. NOTICES

All notices authorized or required between the parties, and required by any of the provisions of this agreement, shall, unless otherwise specifically provided, be given in writing by United States mail or Western Union Telegram, postage or charges prepaid, and addressed to the party to whom the notice is given at the addresses listed on Exhibit "A". The originating notice to be given under any provision hereof shall be deemed given only when received by the party to whom such notice is directed and the time for such party to give any notice in response thereto shall run from the date the originating notice is received. The second or any responsive notice shall be deemed given when deposited in the United States mail or with the Western Union Telegraph Company, with postage or charges prepaid. Each party shall have the right to change its address at any time, and from time to time, by giving written notice thereof to all other parties.

31. OTHER CONDITIONS, IF ANY, ARE:

* * *

Consent to the drilling of a well shall not be deemed as consent to the setting of casing and a completion attempt. After any well drilled pursuant to this agreement has reached its authorized depth, Operator shall give immediate notice to Non-Operators. The parties receiving such notice shall have forty-eight (48) hours (exclusive of Saturday or Sunday) in which to elect whether or not they desire to set casing and to participate in a completion attempt. Failure of a party receiving such notice to so reply within the period above fixed shall constitute an election by that party not to participate in the cost of a completion attempt. If all the parties elect to plug and

abandon the well, Operator shall plug and abandon same at the expense of all the parties. If one or more, but less than all, of the parties elect to set pipe and to attempt a completion, the provisions of Section 12 shall apply to the operations thereafter conducted by less than all parties.

This agreement may be signed in counterpart, and shall be binding upon the parties and upon their heirs, successors, representatives and assigns.

OPERATOR

SOUTHERN UNION SUPPLY COMPANY

ATTEST:

/s/

Assistant Secretary

/s/ By Oran L. Haseltine

Vice President

NON-OPERATOR

WYNN OIL COMPANY

ATTEST:

/s/ Sue Kelly

Asst. Sec'y.

/s/ R. C. Wynn

ATTEST:

SOUTHERN UNION SUPPLY COMPANY

FIDELITY UNION TOWER

DALLAS, TEXAS 75201

November 18, 1975

Wynn Exploration Company

Suite 1808, Campbell Centre

Dallas, Texas 75206

Attention: Mr. R. C. Wynn

Re: Gallagher Prospect, Section 8, 17
and East Half of Section 18, T-17-S,
R-34-E, Lea County, New Mexico

Gentlemen:

Reference is made to our letter to you dated September 8, 1975, to which was attached an operating agreement and also reflected the agreement between Wynn Oil Company and Southern Union Supply Company. I have recently been informed that you have agreed to assume 50% of the cost and obligations as well as the rights and benefits to be earned and acquired in connection with the subject prospect and further that you were desirous of the change in name of your Company from Wynn Oil Company to Wynn Exploration Company.

The purpose of this letter is to amend our agreement dated September 8, 1975, herein above referred to, to the extent that Wynn Exploration Company and Southern Union Supply Company each agree to assume 50% of the cost and obligations and accordingly be entitled to 50% of the rights and benefits to be earned and/or acquired as results of our joint operation hereunder.

It is understood and agreed that the provisions set forth in our letter agreement dated September 8, 1975, shall remain in full force and effect in all of its terms and provisions except as herein specifically amended.

In the event the above remarks correctly state the terms agreed upon, please indicate your concurrence by executing and returning a copy of this letter in the space provided at your earliest convenience since the well is presently on location and drilling.

Yours truly,

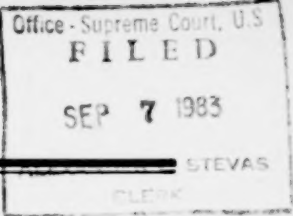
SOUTHERN UNION SUPPLY
COMPANY

By ORAN L. HAZELTINE
Oran L. Hazeltine —
Vice President

AGREED TO AND ACCEPTED THIS 24th
day of November, 1973.

WYNN EXPLORATION COMPANY

By R. C. WYNN
R. C. Wynn — *President*



IN THE
Supreme Court of the United States

October Term, 1983

WYNN OIL COMPANY,

Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,
Respondent.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW MEXICO AND
THE COURT OF APPEALS OF NEW MEXICO**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Of Counsel:

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September 8, 1983

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No. 83-212

IN THE
Supreme Court of the United States

October Term, 1983

WYNN OIL COMPANY,

Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,

Respondent.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW MEXICO AND
THE COURT OF APPEALS OF NEW MEXICO**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

A. Preliminary Statement

This is the second time that Wynn Oil Company ("Wynn Oil") has petitioned this Court for a writ of certiorari in this collection case. This Court denied Wynn Oil's first petition in *Wynn Oil Co. v. Southern Union Exploration Co.*, 455 U.S. 920 (1982).

Following the denial by this Court of Wynn Oil's first petition, the trial court in New Mexico entered Judgment on the Mandate on April 27, 1982 in favor of Southern Union

Exploration Company of Texas ("SXT")¹ against Wynn Oil and Wynn Exploration Company, Inc. ("Wynn X"). Wynn Oil then appealed the Judgment on the Mandate to the New Mexico Court of Appeals. On March 10, 1983, the New Mexico Court of Appeals affirmed the Judgment on the Mandate. Wynn Oil then petitioned for certiorari to the New Mexico Supreme Court. On April 22, 1983, the New Mexico Supreme Court denied Wynn Oil's petition for certiorari. On May 12, 1983, the New Mexico Supreme Court denied Wynn Oil's Motion for Rehearing of the denial of the petition for certiorari. Wynn Oil's second petition for certiorari to this Court was filed August 9, 1983.

The argument advanced by Wynn Oil in its second petition for certiorari to this Court is the same meritless argument that Wynn Oil has been making to the New Mexico trial and appellate courts and to this Court ever since the New Mexico Court of Appeals first upheld the judgment of liability against it on January 13, 1981. On nine separate occasions, in rulings on motions, appeals and petitions for certiorari, the courts have found that Wynn Oil's position has no merit. On the occasion of Wynn Oil's latest appeal from the Judgment on the Mandate, the New Mexico Court of Appeals finally assessed damages against Wynn Oil for a frivolous, bad faith appeal. The Court of Appeals said:

¹ SXT was originally incorporated in the state of Delaware under the name Southern Union Supply Company. In 1978 the name was changed to Southern Union Exploration Company, and in January of 1981 to Southern Union Exploration Company of Texas. SXT is a wholly owned subsidiary of Southern Union Company. Other wholly owned subsidiaries of Southern Union Company are: Southern Union Gathering Company, Southern Union Exploration Company (formerly Southern Union Properties, Inc.), Southern Union Realty Company, Southern Union Refining Company, Southern Union Financial Corporation and Western Gas Interstate Company.

SX asks that damages be awarded under §39-3-27, N.M.S.A. 1978 on the grounds that Wynn Oil's appeal is frivolous, not in good faith and merely for the purposes of delay. We find this request to be meritorious, and award SX damages of \$1,000.00.

Court of Appeals Opinion, March 10, 1983, Wynn Oil second petition, pp. 3a-4a.

The New Mexico Supreme Court declined to disturb the imposition of damages for the frivolous, bad faith appeal although requested to do so in Wynn Oil's subsequent petition for certiorari.

Because of the interest rate legally applicable to the judgment in this case, Wynn Oil has embarked on a campaign to prolong this litigation as long as possible. By contract, and under the New Mexico statutes, the interest rate applicable to SXT's judgment is limited to 10% per annum. See §56-8-3 N.M.S.A. 1978. Since the entry of the original judgment on May 11, 1979, interest on commercial loans has been well above 10% per annum and has exceeded 20% per annum at times. It is obviously to Wynn Oil's advantage to delay conclusion of this case as long as possible.

Wynn Oil's basic argument, that it had no notice it was being sued for breach of contract, can be asserted only by ignoring the pleadings, discovery and the issues tried in this case. The New Mexico Court of Appeals rejected Wynn Oil's notice argument as "frivolous" the first time it was made. Wynn Oil was expressly sued for breach of contract and was found liable. Wynn Oil refuses to see the obvious and attacks the New Mexico courts as inexperienced, incompetent and lacking in proper judicial temperament. Wynn Oil's *ad hominem* attack on the New Mexico courts is both unpersuasive and unseemly.

Wynn Oil's second petition for certiorari to this Court is virtually identical to its first petition for certiorari. (See Wynn

Oil's Petition for Certiorari, United States Supreme Court No. 81-971, filed November 23, 1981.) In fact, many paragraphs are lifted *verbatim* from the first petition for certiorari. Necessarily, this response will contain some repetition from SXT's response to Wynn Oil's first petition for certiorari. Wynn Oil's present petition continues to be frivolous and should be summarily denied.

B. Factual Summary

This is a collection case stemming from breach of a written contract. In general terms, the written agreements between the parties provided that SXT, as operator, and Wynn Oil and Wynn X would participate in the drilling and development of certain oil and gas property in Lea County, New Mexico, known as the Gallagher Prospect.

By letter dated September 8, 1975, (SXT Ex. 1)² Wynn Oil and SXT agreed to participate in the project. The September 8, 1975 letter did not limit Wynn Oil's participation to one well but referenced all of the property involved in the Gallagher Prospect and SXT and Wynn Oil joined without limitation "in this undertaking." The first two wells were to be drilled without further consent of Wynn Oil. Wynn Oil and SXT signed a written operating agreement dated September 15, 1975. (SXT Ex. 3) Under the initial documents, Wynn Oil had a 75% interest in the project and SXT had a 25% interest in the project.

After the initial documents were signed, a third document dated November 18, 1975 was signed by Wynn X and SXT. (SXT Ex. 4) The November 18, 1975 document evidenced the transfer of the transaction from Wynn Oil to Wynn X

² References to the Record Proper not included in the Appendices are cited as "R." with page numbers. References to the trial transcript below are cited as "T." with page numbers. References to trial exhibits below are cited as SXT Ex. with exhibit numbers.

but Wynn Oil was not released as a contracting party. (Finding of Fact No. 5, R. 3639) Also, the third document reduced the interest of the Wynn companies to 50%. In substance, the November 18, 1975 letter agreement made Wynn X an additional obligor on the Gallagher Prospect for 50% of the costs and expenses of the project. By that document the property and any profits to be realized from the venture were placed in Wynn X; however, Wynn Oil was not released from its obligation to pay 50% of the costs and expenses regarding the Gallagher Prospect. After the transfer of the transaction to Wynn X, it was the intent of the parties that Wynn Oil continue to be obligated on wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258) Wynn X was added as a party to the transaction because of tax, accounting and divorce settlement considerations according to R. C. Wynn, the sole stockholder, director and president of both Wynn Oil and Wynn X (T. 817, 821, 823, 841).

SXT commenced drilling the Gallagher Prospect in late 1975. SXT began billing the Wynn corporations for their initial share of the drilling expenses in February, 1976. Contrary to Wynn Oil's contentions, payment demands and other contract documents were sent to and replied to by Wynn Oil as well as Wynn X. (SXT Ex. 66, SXT Ex. 117, T. 3389) Although bills were due 15 days after receipt, the Wynn corporations refused to pay any billings sent by SXT. (T. 866) The Wynn corporations initially refused to pay the bills because of alleged discrepancies (R. 1467) but also withheld payment of admittedly just bills to gain bargaining leverage in their dealings with SXT. (T. 2921-22) The ultimate amount which the Wynn corporations refused to pay was in excess of \$1.7 million. By their refusal to pay, the Wynn corporations placed the entire burden and risk of the project on SXT. (T. 3389-90) The trial court ultimately found that the Wynn corporations' actions constituted "apparent wilful delay in the acknowledgement of a

legitimate debt passed [sic] due." (Trial court decision letter, March 19, 1979, Wynn Oil second petition at 45 a).

C. Legal Proceedings

When it became apparent that the Wynn defendants intended "to ride" SXT (R. 3390), SXT filed suit against the Wynn corporations. In SXT's original complaint, filed June 26, 1976, SXT named Wynn Oil as a party defendant (R. 1), alleged that SXT and Wynn Oil entered into the September 8, 1975 letter agreement regarding exploration and development of the Gallagher Prospect (R. 2) and alleged that SXT and Wynn Oil entered into the September 15, 1975 operating agreement to develop the Gallagher Prospect. (R. 2-3) The original complaint further alleged that on November 18, 1975, there was a transfer of the Gallagher Prospect asset from Wynn Oil to Wynn X. (R. 3) However, SXT made it clear that it considered Wynn Oil to be liable on the contract when it expressly alleged that both Wynn Oil and Wynn X had breached the written agreement (R. 3-4) and prayed for judgment against both Wynn Oil and Wynn X for breach of the written contract as well as relief under other causes of action. (R. 6-7)

SXT's pattern of pleading against Wynn Oil described above was maintained throughout three amendments to the complaint. (R. 60, 158, 1810) In each amended complaint, Wynn Oil was identified as a party defendant, a party to the contract, alleged to be in breach of contract and judgment was prayed for against Wynn Oil as well as Wynn X on all causes of action.

Moreover, as required by Rule 9(k) of the New Mexico Rules of Civil Procedure, SXT attached the written documents upon which SXT's claim for breach of contract was based to the original complaint and to each amendment. These written documents clearly identified Wynn Oil as a contracting party. In addition, the exhibits identified that a transfer of the asset had been made from Wynn Oil to Wynn X. However, the

pleadings reflect that SXT did not treat the transfer of the asset as a release of Wynn Oil because SXT consistently sought judgment against Wynn Oil for breach of contract. Accordingly, Wynn Oil was on notice at all times from the filing of the initial complaint that it was being sued for breach of contract.

The foregoing completely refutes Wynn Oil's claim in its present petition that SXT's only theory against Wynn Oil was *alter ego*. Interestingly, Wynn Oil admitted at page 7 in its first petition for certiorari to this Court that SXT proceeded against Wynn Oil on a breach of contract theory in addition to its *alter ego* theory. Wynn Oil stated:

Southern Union asserted that Wynn Oil should be liable along with Wynn Exploration because both corporations were allegedly the alter egos of R. C. Wynn. *Southern Union did plead that if "Wynn Oil is not the alter ego of R. C. Wynn, then alternatively, Wynn Oil is directly liable for the damages set forth herein" but alleged no basis for said liability.*³ (Emphasis added)

Wynn Oil first petition for certiorari at p. 7.

Wynn Oil apparently realized that this admission in its first petition completely undercut its present lack of notice argument. Wynn Oil's reaction to this problem was simply to drop any mention of SXT's alternative breach of contract theory in its present petition. See Wynn Oil's second petition for certiorari at p. 5. Contrary to Wynn Oil's second petition, pp. 5-6, SXT tried the case against Wynn Oil on the theory pleaded, that is, breach of contract by Wynn Oil. SXT's theory asserted that Wynn Oil had become obligated to SXT by virtue of the initial contract documents and that Wynn Oil was not

³ Wynn Oil is incorrect in stating that SXT alleged no basis for liability for damages directly from Wynn Oil. SXT alleged that Wynn Oil breached the written contract and that it was liable to SXT directly for that breach of contract in addition to the allegations relating to *alter ego*.

released by the November 18, 1975 letter agreement by which Wynn X was added as a party to the transaction. Again, contrary to Wynn Oil's second petition, pp. 5-6, SXT's trial brief reiterated the breach of contract argument and asked for judgment against Wynn Oil as well as Wynn X for breach of contract. (R. 3543-44)

Wynn Oil obviously had notice of SXT's breach of contract claim against it because in the pleading, discovery and trial stages of this case, Wynn Oil raised a specific defense to the breach of contract count. Wynn Oil's original defense was that Wynn Oil had never signed *any* contracts with SXT regarding the Gallagher Prospect. Wynn Oil maintained that the transaction was always intended to be in Wynn X and that SXT had mistakenly prepared, and Wynn Oil had mistakenly signed, the initial contract documents.⁴

By letter dated March 19, 1979 the court advised the parties of its decision in which it found in favor of SXT on its complaint against both Wynn corporations. The trial court further rejected all of Wynn X's counter-claims. (R. 3545) The trial court entered detailed findings of fact and conclusions of law which rejected Wynn Oil's theory that Wynn Oil was not liable to SXT because Wynn Oil plainly appeared as a signatory to the initial contract documents. (R. 3638, Finding No. 4) The trial court further found that the third document did not release Wynn Oil from its contract obligations. (R. 3639, Finding No. 5) The trial court's decision was that both Wynn corporations, Wynn Oil and Wynn X, were in breach of contract.

⁴ It is true that Wynn X counterclaimed against SXT. (R. 1883) However, contrary to Wynn Oil's second petition, p. 4, the Wynn defendants refused payment prior to any claim against SXT for negligent drilling and development of the property.

On July 3, 1979 a supersedeas bond in the sum of \$1.5 million was posted on behalf of Wynn Oil. Wynn X did not supersede the judgment and SXT's operator's lien against Wynn X's interest in the Gallagher Prospect was foreclosed. On May 4, 1982, after entry of the Judgment on the Mandate, SXT collected \$1.5 million on the supersedeas bond. Until SXT effected this collection on the first Judgment on the Mandate, the Wynn corporations had no investment in the property whatever. There remained a deficiency as of May 4, 1982 of \$668,973.03 for which both Wynn Oil and Wynn X are liable.⁵ The judgment against Wynn Oil and Wynn X bears interest at 10% per annum under New Mexico law. §56-8-3 N.M.S.A. 1978. It has been, and is now, to Wynn Oil's advantage to delay the conclusion of this case as long as possible because of the current higher rates of interest. It is suggested that this second petition is part of a strategy to delay, as long as possible, the conclusion of this case.

D. The First Appeal

In its brief in the New Mexico Court of Appeals on the first appeal, Wynn Oil contended that the basis of its liability in the trial court, that it had undertaken certain obligations by signing the initial contract documents and had never been released therefrom, was neither pleaded nor tried. In response to Wynn Oil's argument that it did not have notice of the basis of liability, the Court of Appeals referred to the extensive

⁵ R. C. Wynn was the president, sole stockholder and director of both Wynn corporations. (T. 817, 821, 823) At the time Wynn X was proposed as a contracting party by R. C. Wynn in November of 1975, Wynn X had no assets of value. (T. 830-831) Wynn X remained a shell throughout this litigation and conducted no business except as a party litigant in this case, financed for that purpose by R. C. Wynn. At the conclusion of the litigation in the trial court, it was obvious that a judgment against Wynn X would never be collectible. The judgment against Wynn Oil is apparently collectible from letters of credit posted by Wynn Oil to supersede the Judgment on the Mandate during this second appeal.

pleading and discovery in this case and termed Wynn Oil's argument "frivolous." (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 16a)

Wynn Oil also argued on the first appeal, as it had in the trial court, that Wynn Oil had not intended to sign *any* contract documents and therefore was not a party to the contract with SXT. Wynn Oil further argued that the trial court's findings that Wynn Oil had executed the contract and became a party thereto were not supported by substantial evidence. Alternatively, Wynn Oil argued for the first time on appeal that if it was held to have signed the initial contract documents, then the November 18, 1975 letter constituted a novation by which Wynn Oil was released from its contract obligations.

With regard to the issue of liability as to Wynn Oil the New Mexico Court of Appeals correctly observed that Wynn Oil did not sign the third document of the contract. (Court of Appeals Opinion, January 11, 1981, Wynn Oil second petition, p. 16a, Wynn Oil second petition, p. 21a) The Court of Appeals, however, held that Wynn Oil became liable to SXT on the basis of the initial contract documents and was never released therefrom. Wynn Oil's argument that the November 18, 1975 letter worked a novation releasing Wynn Oil was also rejected. On this basis, the judgment of liability against both Wynn Oil and Wynn X was upheld. The decision of the New Mexico Court of Appeals was entered January 18, 1981. While the decision remanded the case to the trial court for minor modifications in the judgment, SXT substantially prevailed on the first appeal. Wynn Oil's suggestion that it prevailed on the first appeal is grossly misleading.

E. Proceedings on Remand

The New Mexico Court of Appeals remand instructions on the first appeal appear at the end of the decision. The Court of Appeals stated:

The judgment of liability having been affirmed, the cause is remanded for further proceedings in connection with the amount of the judgment, as previously specified.

Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 30a.

What was "previously specified" by the Court regarding the amount of the judgment? The Court of Appeals directed that three discrete items be corrected in the amount of the judgment:

1. There was a discrepancy of \$34,867.43 for operating costs and delay rental which appeared in the judgment but not the findings. The Court of Appeals directed the trial court to resolve the discrepancy on remand. (Court of Appeals Opinion, January 13, 1981, Wynn Oil's second petition, p. 23a)

2. Credits to the Wynn corporations for sales of oil and gas production were to be credited monthly as received instead of a lump sum on October 31, 1978. (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, p. 24a)

3. The interest on the money owed by the Wynn corporations was to be simple rather than compound. (Court of Appeals Opinion, January 13, 1981, Wynn Oil second petition, pp. 25a-26a)

Certainly, the Court of Appeals did not specify that Wynn Oil's liability was different from Wynn X's liability. On this point the Court of Appeals stated:

The trial court found Wynn Oil and Wynn X liable for 50 percent of SX's costs and expenses. This percentage amount has not been disputed. The trial court concluded that Wynn Oil and Wynn X, as of November 1, 1978, owed SX \$1,879,791.22 and entered judgment for that amount on May 11, 1979. This is an incorrect sum. (Emphasis added.)

Wynn Oil's second petition at 23a.

Thus, Wynn Oil's argument that the Court of Appeals intended on remand for the trial court to calculate a different basis of liability for Wynn Oil is directly refuted by an express statement in the first opinion of the Court of Appeals.

On remand the trial court made the three minor corrections in the amount of the judgment specified by the Court of Appeals. The trial court did not change its prior ruling that Wynn Oil and Wynn X were each liable for 50% of the costs and expenses of drilling and operating the Gallagher Prospect wells. The Judgment on the Mandate against Wynn Oil and Wynn X, as recalculated, was \$1,714,571.41. (Judgment on the Mandate, Wynn Oil second petition, p. 47a)

The trial court would have violated the mandate of the Court of Appeals if it had found, as Wynn Oil requested, that Wynn Oil was liable for 75% of the cost of the first well only. (\$346,345.41) As noted above, Wynn Oil did not dispute that it was liable for 50% of all well costs on the first appeal, and the Court of Appeals expressly so found.⁶

Wynn Oil also argues in its second petition that it did not consent to the drilling of the last four wells. In doing so, Wynn Oil ignores the evidence that the intent of the parties was that Wynn Oil initially agreed to responsibility for all wells drilled on the Gallagher Prospect (SXT Ex. 1, the September 8, 1975 letter agreement). Wynn Oil also ignores evidence of the intent of the parties that Wynn Oil was obligated on all wells which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258)

On this point the trial court's decision stated:

⁶ Wynn X conceded that it owed 50% of the costs and expenses of all wells. Wynn X's only asset of consequence was its 50% interest in the Gallagher Prospect which was foreclosed in this proceeding. Wynn X is presently judgment proof.

With the exception of the Supco Number One Well upon which the notice was clearly inappropriate under the terms of the original agreement or understanding, I believe that the evidence must weigh on behalf of the plaintiff [SXT] to the extent that Wynn was in fact a willing participant in each of the drilling operations.

Defendant Wynn Companys did pursue the matter and all outward communications reflected continuing participation and interest upon the part of the Wynn defendants.

(Trial court decision letter, Wynn Oil second petition, pp. 41 a-42a)

In effect, Wynn Oil is asking this Court to determine the weight and credibility of the evidence. This effort was rejected by the New Mexico appellate courts and should be rejected here. The substantial evidence rule, which is universally accepted, prohibits the appellate courts from weighing the credibility of the evidence presented at trial. There was clearly sufficient evidence for the trial court to hold Wynn Oil liable for 50% of the costs and expenses of all five wells.

F. The Second Appeal

On April 27, 1982, the trial court entered the Judgment on the Mandate. Wynn Oil appealed from that judgment and, in essence, asked the New Mexico Court of Appeals to decide whether its first opinion meant that Wynn Oil had a different basis of liability than Wynn X; that is, that Wynn Oil was liable for 75% of the costs of the first well only instead of 50% of the costs of all five wells. In a unanimous opinion entered March 10, 1983, the Court of Appeals affirmed the Judgment on the Mandate which held Wynn Oil liable for 50% of the cost of all five wells.

The result was not surprising. The first opinion expressly stated that Wynn Oil and Wynn X were each liable for 50%

of the costs of all five wells. This point was not even disputed by Wynn Oil in the trial or on the first appeal. Moreover, Wynn Oil's argument had previously been rejected by the Court of Appeals in ruling upon Wynn Oil's Motion to Recall Mandate (the first Mandate) filed September 9, 1981. In its Motion to Recall Mandate Wynn Oil specifically sought a statement from the Court of Appeals that Wynn Oil was liable for only 75% of the cost of the first well. Wynn Oil's Motion was summarily denied by the author of the first opinion, Chief Judge Wood, and Judge Lopez, who concurred in the first opinion. Judge Walters, the other concurring judge on the first opinion, also concurred in the second opinion. Thus, all three judges involved in the original unanimous opinion have reviewed and rejected Wynn Oil's suggestion that the first opinion held that Wynn Oil was liable for only 75% of the cost of the first well.

The second opinion also assessed damages of \$1,000.00 against Wynn Oil for a frivolous, bad faith appeal made for purposes of delay. This was a gentle but firm statement to Wynn Oil that the Court of Appeals was tiring of Wynn's campaign to prolong this litigation indefinitely in an effort to avoid payment of a just debt. The damage award was left undisturbed by the New Mexico Supreme Court.

JURISDICTION

This Court Lacks Jurisdiction Because the Petition Presents No Substantial Federal Question

It is settled that the United States Supreme Court will not accept a case on certiorari unless it presents a substantial federal question. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1951); *Zucht v. King*, 260 U.S. 174, 176 (1922).

The present case is not appropriate for review because it is devoid of a substantial federal question. Even Wynn Oil acknowledges that this is a simple contract case between private

parties. (Wynn Oil's second petition, pp. 2-3) Wynn Oil and SXT undertook to participate in a drilling venture in Lea County, New Mexico and were to share in the drilling, development and operating expenses and the profits if any. At about the time drilling commenced, Wynn X, another corporation solely owned and operated by R. C. Wynn, was added as an additional obligor to the transaction, but Wynn Oil was never released from its obligations. The Wynn corporations failed to pay their share of the drilling, development and operating expenses. SXT sued Wynn Oil and Wynn X for breach of contract. No federal question was ever presented in the voluminous pleadings in this case. No federal questions arose in discovery and no federal issues were suggested at trial. Similarly, no federal questions were suggested on appeal until a second motion for rehearing was filed during the first appeal following a denial of certiorari by the New Mexico Supreme Court. This occurred after the first appeal had consumed over two years. On its Second Motion for Rehearing in the New Mexico Supreme Court on the first appeal, Wynn Oil claimed for the first time that it had been deprived of due process and equal protection of the law under the United States Constitution because it did not have "notice" that it was being sued for breach of contract.

Similarly, on its second appeal Wynn Oil made no mention of deprivation of constitutional rights in the New Mexico Court of Appeals. Wynn Oil did not make such claims until it filed its petition for certiorari in the New Mexico Supreme Court thereby raising a "federal question" for the purpose of continuing its campaign prolonging this litigation.

In another contract case between private parties, *Black v. Cutter Laboratories*, 351 U.S. 292 (1955), this Court denied a petition for certiorari on the basis of lack of a substantial federal question. This Court said:

As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented.

351 U.S. at 299.

Like *Black*, the decision of the New Mexico courts involves a determination of the rights and obligations under state law of a contract between private parties. There is no treaty, no federal statute, no federal regulation and no issue of federal law in this case which would suggest that this Court accept this case on certiorari.

ARGUMENT

Reasons for Denying the Writ

Rule 17 of the Rules of the United States Supreme Court provides as follows regarding considerations governing review on certiorari:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The principle embodied in Rule 17 was expanded upon in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1954). In *Rice* the Court said:

In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, *the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.*"

Lane Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.C. 422 (Emphasis supplied.)

349 U.S. at 79.

Based upon a reading of Rule 17 and *Rice*, this case does not present a situation which qualifies for consideration on certiorari by the Supreme Court.

1. The Decision in This Case Does Not Conflict With Any of This Court's Opinions or Any Court's Opinion.

At no place in this second petition does Wynn Oil contend that the decision of the New Mexico courts is in conflict with any opinion of this Court or any other court. In essence, this case presents a state court interpretation of a contract between private parties on facts peculiar to this case. There are no federal issues involved in the contract interpretation and no federal statutes come into play. As such, the decision is not in conflict with any state or federal decisions.

2. The Decision in This Case Affects Only the Litigants Involved and Has No Application Beyond Those Litigants.

Wynn Oil acknowledged in its first petition that this is a case which will affect only Wynn Oil and SXT. (Wynn Oil first petition, p. 14) There is no principle involved here which will have application beyond the parties even if this case were to be accepted for consideration on certiorari. Nothing has happened since the first petition to change the fact that this remains a case which will affect only Wynn Oil and SXT.

3. The Decision Reached by the New Mexico Court is Correct.

Finally, the decisions of the New Mexico trial and appellate courts have not departed from the accepted and usual course

of judicial proceedings. On the contrary, the courts in this case have done justice between the parties. The essence of Wynn Oil's petition is that it did not have either notice or opportunity to defend itself on the basis of liability which was ultimately sustained by the New Mexico courts. The basis of liability found by the trial court and sustained by the appellate courts in New Mexico was simply that Wynn Oil was the signatory to a contract regarding the development of certain oil and gas property in New Mexico. Wynn Oil was never released from its obligations although there was a subsequent document by which another Wynn corporation, Wynn X, was added as an obligor on the contract.

Wynn Oil's claim that it had no notice of this theory of liability is totally unfounded. As indicated earlier, SXT, in its initial complaint, sued Wynn Oil and Wynn X on the contract. It is true that SXT had an alternative theory of recovery, *alter ego*, but from the outset SXT sought to obtain a judgment against Wynn Oil as well as Wynn X for breach of contract. The written agreements were attached to the complaint and the three amendments to the complaint. SXT in its pleadings identified the Wynn Oil-Wynn X transfer but still sought judgment against Wynn Oil for breach of the contract. Therefore, Wynn Oil was clearly on notice that SXT sought to hold Wynn Oil liable for breach of the written contract. Wynn's lack of notice claim is patently frivolous.

The discovery phase of this case took over two years. There are some 4,000 pages of pleadings excluding depositions. Wynn Oil took the deposition of SXT's chief executive officer three times during trial preparation. Had the pleadings been unclear in the least, Wynn Oil certainly had ample opportunity to discover the basis for SXT's claims against Wynn Oil.

At trial, SXT introduced as proof of its claim all of the contract documents and sought judgment for breach of contract against Wynn Oil. Wynn Oil's lack of notice argument is further

flawed by the fact that Wynn Oil presented a defense on this issue at trial. Wynn Oil's defense at trial was that it did not intend to sign *any* of the contracts. R. C. Wynn claimed that it was just a "mistake" that the initial contracts had been signed by himself on behalf of Wynn Oil. The trial court rejected Wynn's testimony and found that Wynn Oil was a signatory to the contract. The trial court entered judgment against Wynn Oil and Wynn X because both were parties to the contracts. Wynn Oil undertook certain obligations and was never released from them.

Wynn Oil's table at pp. 12-13 of its second petition purporting to summarize the documents is inaccurate and misleading and ignores the testimony regarding the documents. The first document committed Wynn Oil to pay 75% of the costs and expenses on the entire Gallagher Prospect and to pay 75% of the costs and expenses of the Gallagher State 8-2 and the Lea-C-State without further election. (P. Ex. 1, T. 144, 255) The second document is the Operating Agreement which put the initial agreement into effect. The third document evidenced the transfer of the transaction from Wynn Oil to Wynn X, added Wynn X as an additional obligor for 50% of the costs and expenses but did not release Wynn Oil from its obligations. SXT has consistently acted in accordance with the contract and sought only 50% of the costs and expenses of all the wells from Wynn Oil and Wynn X. Indeed, Wynn Oil asserted until the first opinion of the New Mexico Court of Appeals that it was liable for nothing, but if it was liable at all, its liability was limited to 50% of the costs and expenses of the wells in which the Wynn corporations elected to participate. If there were some basis for Wynn Oil's present position, it seems that Wynn Oil would have made it known during discovery or trial.

Wynn Oil's table also fails to take cognizance of the testimony that it was the intent and understanding that Wynn Oil was obligated on all wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. (T. 255, 258)

After Wynn's trial defense failed, Wynn Oil tried a new and different theory on appeal. In the Court of Appeals, Wynn Oil argued that if it had intentionally signed the first two documents, the November 18, 1975 letter constituted a novation as a matter of law thereby releasing Wynn Oil from any obligations with respect to the Gallagher Prospect. Again, Wynn Oil's argument is proof that Wynn Oil had notice of the basis of the judgment against it and raised a defense.

Wynn Oil's table regarding the theory upon which it was held liable at p. 14 of its second petition is also inaccurate. *Alter ego* was not SXT's only theory against Wynn Oil as Wynn Oil admitted in its first petition. While the Court of Appeals found that the third document itself was not an assignment, it did evidence the transfer of the transaction from Wynn Oil to Wynn X and, more importantly, affirmed that Wynn Oil was never released from its obligations to SXT. Wynn Oil ignores the evidence regarding the understanding that Wynn Oil was responsible for wells in which Wynn Oil, R. C. Wynn or Wynn X elected to participate. The second Court of Appeals opinion affirmed the Judgment on the Mandate by referring to the first opinion as a whole. Wynn Oil finds fault with this approach, and would have the courts focus on one phrase of the first opinion taken totally out of context by Wynn Oil.

Again, the theory of liability upheld in the first decision of the Court of Appeals is the same pleaded by SXT and found by the trial judge. Wynn Oil undertook certain obligations in writing and was never released therefrom. The Court of Appeals affirmed the Judgment on the Mandate. The only issue was whether the Court of Appeals intended by its first opinion to hold Wynn Oil liable for 50% of the costs of all wells. Certainly, the Court of Appeals is the best judge of the intent of its first opinion. Accordingly, the decisions of the New Mexico courts in this case are correct and there is no reason to grant Wynn Oil's second petition for certiorari so that this Court can review issues it has previously declined to review.

CONCLUSION

In sum, Wynn Oil had adequate notice of SXT's claims in this litigation. Wynn Oil defended the claims vigorously, and presented multiple defenses in the trial and appellate courts of New Mexico. The rejection of Wynn Oil's arguments is not a basis for review of this case by this Court, and certainly not on the ground of lack of notice, opportunity to defend or unequal treatment. Rather, Wynn Oil has taken full advantage of the judicial system to avoid payment of a substantial and just debt. Wynn Oil has had its day in court several times now and the time has arrived to terminate this litigation. SXT respectfully requests that Wynn Oil's second petition for writ of certiorari be denied.

Respectfully submitted,

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September 8, 1983

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ALEXANDER L. STEVAS,
CLERK

No. 83-212

IN THE
Supreme Court of the United States

October Term, 1983

WYNN OIL COMPANY,

Petitioner.

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW MEXICO AND
THE COURT OF APPEALS OF NEW MEXICO

PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION

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**ON WRIT OF CERTIORARI TO
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**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

In its Petition for Writ of Certiorari, Wynn Oil shows there is no legal or rational basis for holding it jointly liable with Wynn Exploration for one-half of the costs of Gallagher Prospect wells in which only Wynn Exploration — not Wynn Oil — elected to participate with Southern Union — *i.e.*, the second, third, fifth, and sixth wells. In its Brief in Opposition, Southern Union seeks to justify the arbitrary and capricious judgments below by claiming a basis of Wynn Oil's liability that was not pled, tried or utilized by the New Mexico courts, and is not supported by evidence or law.

Specifically, Southern Union claims (R. Br. 4, 19) that the September 8, 1975 letter agreement between Southern Union and Wynn Oil (P. Ex. 1) obligated Wynn Oil to pay seventy-five percent of the costs of all Gallagher Prospect wells, not simply the initial well identified in that document and any additional Gallagher Prospect well in which Wynn Oil expressly elected to participate in writing pursuant to paragraph 12 of the operating agreement between Southern Union and Wynn Oil (App. 63a). In other words, while Southern Union does not challenge Wynn Oil's showing that Wynn Oil did not elect to participate in any Gallagher Prospect well after the initial well identified in both the September 8, 1975 letter agreement and the operating agreement, Southern Union now claims that the New Mexico courts could and did disregard the election provisions of the operating agreement as to additional wells, because the September 8, 1975 letter agreement "did not limit Wynn Oil's participation to only one well, but referenced all of the property involved in the Gallagher Prospect and SXT and Wynn Oil joined without limitation' " (R. Br. 4).

Southern Union's new theory of liability would have required the New Mexico courts to hold Wynn Oil liable for all six Gallagher Prospect wells (*see* App. 3a, para. 8). However, the trial court found that neither Wynn Oil nor Wynn Exploration consented under paragraph 12 of the operating agreement to participate in the fourth well, Supco State No. 1 (*id.*, para. 7), and held them liable only for the initial well and the four additional wells in which Wynn Exploration had consented to participate (*id.*, para. 10).

Despite Southern Union's assertions regarding the September 8, 1975 letter agreement, the unassailable fact is that the document is silent as to the identity, location and number of wells in which Wynn Oil was to participate, except it does name and locate the initial well to be re-entered, and mentions an "option to re-enter" a second well (P. Ex. 1). It identifies the

subject properties (*i.e.*, "Gallagher Prospect, Section 8, 17 and E/2 Section 18, T-17-S, R-34-E, Lea County, New Mexico"), the initial well to be drilled (*i.e.*, "re-enter the Pennzoil United, Inc. #2 Gallagher . . . located in the SW corner of Section 8"), the amount of the overriding royalty interests, and the participation percentage of Wynn Oil (*i.e.*, "seventy-five percent") (*id.*). Finally, the September 8, 1975 letter agreement, which Wynn Oil accepted on October 4, 1975 —

Enclosed . . . an operating agreement in duplicate with accounting procedures attached which we request you to execute and attest to and return one fully executed copy to us. (*Id.*)

The operating agreement, which was thus made a part of the September 8, 1975 letter agreement, identified the same Gallagher Prospect properties and initial well (P. Ex. 3, para. 7 at 3); clearly required Southern Union to give Wynn Oil thirty days written notice of its intention to drill, rework, deepen, or plug back any additional wells (*id.*, para. 12 at 5; *see* App. 63a); and specified that a failure of Wynn Oil to affirmatively reply, in writing (*id.*; *see* App. 65a), that it elected to participate in the proposed operation would "constitute an election by that party not to participate in the proposed operation" (*id.*; *see* App. 63a), in which event Southern Union was to bear the "entire cost and risk of conducting such operations" (*id.*; *see* App. 64a).

In its first decision, the New Mexico Court of Appeals ruled that Wynn Oil could not be held liable for a share of the costs of any well on the ground that it was an unreleased assignor of Wynn Exploration by virtue of the November 18, 1975 letter agreement, since Wynn Oil was not a party to the agreement (App. 20a, 21a). Thus, that court destroyed any legal basis for holding Wynn Oil liable for any Gallagher Prospect well in which Wynn Exploration, but not Wynn Oil, had elected to

participate. Further, the New Mexico Court of Appeals ruled that Wynn Oil was liable only "on the basis of the documents it executed" — *i.e.*, the September 8, 1975 letter agreement and the enclosed operating agreement (App. 21a), which specified affirmative election requirements as to all Gallagher Prospect wells after the initial well described in both documents. Southern Union's claims to the contrary notwithstanding, there is not a shred of evidence indicating that Wynn Oil ever waived or was estopped to rely upon these affirmative election requirements, nor is there anything in the record indicating that Southern Union so claimed in its pleadings, at any trial, or on any appeal until now.

There is no legal basis suggested by the trial court's second judgment (App. 7a) or by the New Mexico Court of Appeal's second decision (App. 1a) for holding Wynn Oil liable on Gallagher Prospect wells in which it did not elect to participate. The new basis suggested in Southern Union's brief does not make those judgments any less arbitrary, capricious, irrational or unconstitutional.

Respectfully submitted,

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